

UST POLICY COMMISSION MEETING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Phoenix, Arizona
February 26, 2003
9:04 o'clock a.m.

JENNIFER SCHUCK, RMR, CRR
Certified Court Reporter
Certificate No. 50020

1 THE MEETING OF THE UST POLICY COMMISSION held on
2 February 26, 2003, at 9:04 o'clock a.m., at the Arizona
3 Department of Environmental Quality, 1110 W. Washington,
4 Room 250, Phoenix, Arizona, in the presence of:

5
6 Michael O'Hara, Chairman
7 Harold Gill, Vice Chairman
8 Roger Beal
9 Gail Clement
10 Theresa Foster
11 Tamara Huddleston
12 Leandra Lewis
13 Andrea Martincic
14 Bob Rocha (Alternate member)
15 Myron Smith
16 George Tsiolis

17
18 ABSENT MEMBERS:

19 (None)
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1 Phoenix, Arizona
February 26, 2003
2 9:04 o'clock a.m.

3
4 P R O C E E D I N G S

5 CHAIRMAN O'HARA: I'm going to call this
6 meeting to order, if everyone would take a seat, please.
7 Thank you all for being here today despite the weather. I
8 would like to start with a roll-call on my left, with
9 Tamara.

10 MS. HUDDLESTON: Tamara Huddleston with the
11 Attorney General's Office.

12 MS. CLEMENT: Gail Clement.

13 MS. MARTINCIC: Andrea Martincic.

14 MR. SMITH: Myron Smith.

15 CHAIRMAN O'HARA: Michael O'Hara.

16 MR. GILL: Hal Gill.

17 MS. FOSTER: Theresa Foster.

18 MR. BEAL: Roger Beal.

19 MS. LEWIS: Leandra Lewis.

20 MR. TSIOLIS: George Tsiolis.

21 CHAIRMAN O'HARA: Great, thank you.

22 Moving on to Item -- Let the record reflect that
23 Mr. Rocha is present and sitting in for Shannon Davis. I
24 believe, Bob, if I understand right, you are an alternate
25 so you are eligible to vote.

1 MR. ROCHA: That is correct.

2 CHAIRMAN O'HARA: Moving on to Item 2,
3 administrative issues. We postponed the approval of
4 minutes from December. Some people didn't have a copy.
5 Has everyone received a copy of both the December 2002 and
6 the January 2003 minutes and had an opportunity to read
7 those?

8 MS. FOSTER: Yes.

9 MR. BEAL: Yes.

10 CHAIRMAN O'HARA: Are there any changes,
11 corrections? Okay. You want to move those, Hal.

12 MR. GILL: I move that the minutes for
13 December and January be accepted as submitted.

14 MR. TSIOLIS: I second the motion.

15 CHAIRMAN O'HARA: All those in favor of
16 accepting the approval of minutes from January -- excuse
17 me, December 2002 and January 2003, please say aye. Those
18 opposed say nay. Motion passes.

19 Moving on to Item 3, UST Policy Commission
20 procedures. We have some new members as everyone is aware
21 of. And I wanted to kind of -- as kind of the first order
22 of business kind of review what we have done in terms of
23 setting up ground rules for the meetings. And that was
24 done -- Myron, do you remember when we first started? Was
25 it '98 or so?

1 MR. SMITH: Al, when was our first meeting?

2 MR. JOHNSON: It was January '99.

3 CHAIRMAN O'HARA: And at that time -- I
4 think I circulated the rules that we agreed to at that
5 point, and hopefully everybody got a copy of these
6 yesterday or Monday. They are basically -- We didn't go
7 with a full formal Robert's Rules but along the lines of
8 that.

9 We also -- I want to bring particular attention
10 to, I think it is, Number 11. It says, "Meetings will be
11 kept as informal as possible," and I think that was a good
12 suggestion. We've kind of used that rule from our
13 inception.

14 I also printed out some excerpts from Robert's
15 Rules. And I think we are maybe reaching the point due to
16 the number of people that attend the meetings and some of
17 the issues that have become quite contentious, that it may
18 be time to add a little formality to our proceedings
19 because we have really tried to elicit a lot of public
20 comment. Sometimes we get stuck on some issues and aren't
21 able to finish our business.

22 Let me read this one excerpt that I circulated
23 to everyone, especially the italics, the first part. "The
24 degree of formality the presiding officer uses will depend
25 on the size of the group and the amount of agreement in

1 the group. A small group in close agreement needs less
2 strict adherence to procedural rules than one in which
3 sharp differences of opinion and war in cliques exist."
4 And it is my observation that we've kind of gone more
5 towards the latter part of that, with sharp differences
6 and war in cliques. My feeling, it may be time to add
7 some formality.

8 I wanted to get your feeling as a Commission if
9 you want to continue to see an informal manner or add a
10 little more formality to it. So I open it up to
11 discussion.

12 MS. LEWIS: Mr. Chairman, as a new person
13 and sitting on some other commissions, it was very
14 confusing to try to figure out coming into the meeting who
15 was doing what, when, where, and why. It was very
16 confusing when questions were taken from the floor
17 throughout the meeting and very little was really said by
18 the Commission members. So I left confused as to what was
19 really our role and what was our purpose in being here.
20 We represent a specific group and to help move this along,
21 it was confusing that we were really doing that.

22 CHAIRMAN O'HARA: Have you served on other
23 boards, then, Leandra?

24 MS. LEWIS: I was on the Brown Cloud Summit,
25 and I have been chairing two visibility committees.

1 CHAIRMAN O'HARA: It is unusual, in your
2 opinion, the manner in which we take public comment?

3 MS. LEWIS: That's why I was so confused
4 because I thought there was a governmental procedure in
5 how these things were done.

6 CHAIRMAN O'HARA: We have operated more as a
7 stakeholder group, wouldn't you say, Myron? More
8 listening to input and kind of give and take back and
9 forth. I think that worked at first. There was so many
10 issues and some contentious issues that we are starting to
11 get bogged down, I think, in a lot of comment.

12 I'll open the floor up to anyone else. Hal.

13 MR. GILL: As the chair of the technical
14 subcommittee, I've basically had to do the same thing.
15 The subcommittee is even more open in that we use it as a
16 forum for discussion for issues that we bring to the
17 Policy Commission. But because the agendas are reaching
18 one and a half to two pages of the issues that we need to
19 get through, I have had to impose a little more structure
20 to it. And basically, as you said, to move through the
21 agenda, if I see that we're not getting anywhere on a
22 particular issue, then I'll stop and move to the next one.

23 So we still want discussion. I think we need to
24 have discussion. But because of the size of the agendas
25 and because of the sharp difference of opinion, as you

1 stated, I think we do need to have a little bit more; but
2 I don't want to go completely towards the Robert's Rules
3 because then it is very difficult to have discussion, I
4 think.

5 CHAIRMAN O'HARA: Any other comments?

6 MS. MARTINCIC: I would just ask if we
7 change our format, that it is clear and everyone knows the
8 process to follow.

9 CHAIRMAN O'HARA: In terms of how this is
10 going to work practically, I think it is incumbent upon me
11 to maintain order and to make sure that any speaker,
12 members of the public, are on topic. So I'm prepared to
13 do that.

14 The other issue, I think it goes hand in hand
15 with this formality issue is, Number B -- or Letter B,
16 which is the structure of public comment. And I would
17 like to get some feedback on that also. We have -- when
18 we first started, and I had gone through our minutes, it
19 clearly states that we are going to have speaker slips.
20 But to my memory, I don't think we've ever actually done
21 that.

22 MR. GILL: We actually did discuss that.

23 CHAIRMAN O'HARA: Okay.

24 MR. GILL: And from what I remember in our
25 discussions, we -- I think from what I remember -- And I

1 can check back in the minutes. I thought we decided that
2 we thought that it would slow the discussion down too
3 much; but if people wanted to turn in speaker slips, they
4 could.

5 CHAIRMAN O'HARA: Okay.

6 MR. GILL: But I would have to look back at
7 that.

8 CHAIRMAN O'HARA: That and, also, I think
9 the second part of that is we made a decision to put
10 public comment at the end of virtually every topic as
11 opposed to more traditionally what you see is public
12 comment coming at the end. So that's an issue I want to
13 bring up and get some comment on, is that still a practice
14 we want to continue? Or do you think we should put it
15 back at the end and then -- I mean, there is -- obviously,
16 there is going to be times where we want to get public
17 comment because people in the public have information. I
18 think as a general rule, do we want to keep it at the end
19 of every item or do we want to move it to the end?

20 MS. MARTINCIC: End.

21 CHAIRMAN O'HARA: End? Any other comments,
22 feelings? Mr. Beal.

23 MR. BEAL: When we're on point, I think
24 comments that relate to that help clarify or give us
25 greater understanding of the discussion taking place at

1 that time. I'm afraid that I might have a little bit of a
2 problem remembering exactly the essence of the
3 conversation we've been having relating to the public
4 comment if it is all at the end on a variety of subjects.
5 So I prefer that it stays behind each issue as we go
6 through it.

7 I would comment on the structuring of comments
8 as well. I think they contribute in the fact that they
9 often open up views that we're maybe not considering or
10 not aware of on a particular topic. And while it is
11 difficult to stay on point, it does give us the idea of
12 someplace to go with the topic.

13 CHAIRMAN O'HARA: It was going to be my
14 recommendation that as a general rule we put public
15 comment at the end. However, in any specific topic if the
16 chair or individual members have a question that they
17 would like to solicit information from the public, they
18 can at that time make a specific -- there is some issues
19 that obviously maybe it's not appropriate for public
20 comment. That was going to be my recommendation.

21 MS. MARTINCIC: It would be determined on
22 the agenda?

23 CHAIRMAN O'HARA: I think it would be
24 automatically off the agenda. It would be at the end. If
25 a speaker maybe submitted a slip, said he had particular

1 interest in a topic, or alternatively if the member
2 themselves felt the need to get information from the
3 public, at that point it would be appropriate as a general
4 rule.

5 Ms. Huddleston.

6 MS. HUDDLESTON: I agree that sometimes it
7 is better to have the comment at the time you are having
8 the discussion because it may bring forward a point.

9 CHAIRMAN O'HARA: True.

10 MS. HUDDLESTON: However, I would suggest
11 that comments be made to the Commission and that the
12 Commission then seek further inquiry from the Department
13 or from someone else, if we need to.

14 CHAIRMAN O'HARA: I agree with that. That's
15 another part of this public comment, is that it is my
16 intention to recognize public speakers in the public. And
17 oftentimes you may have witnessed where the public will
18 start questioning each other. They will start asking
19 questions of the Department as opposed to asking us. And
20 then I think if it is appropriate, we can ask the
21 Department or whomever, Do you want to respond to that?
22 Comments should always come to the chair, and we should
23 always direct responses.

24 MS. CLEMENT: Will there be a limit on the
25 time that public comment -- or comment will be provided so

1 that we can keep focused? Or are you going to leave that
2 open-ended?

3 CHAIRMAN O'HARA: I think we should follow
4 the rules that we have currently, which is a maximum of
5 five minutes per speaker unless the chair extends time.

6 MS. CLEMENT: Would that be five minutes per
7 topic or five minutes per speaker?

8 CHAIRMAN O'HARA: I think it was per
9 speaker. Is that appropriate, or do you feel that's
10 excessive?

11 MS. CLEMENT: If you are going to organize
12 it so that the comments come at the end, then five minutes
13 per speaker I believe would be appropriate. But if you
14 are going to organize given a particular topic, I would
15 like to see that be a smaller period of time potentially.

16 CHAIRMAN O'HARA: Let me ask you. In order
17 to implement these, do we need to have some motions and
18 vote on these particular issues? Or do you think it is
19 something if we have consensus on, the chair can go ahead?

20 MS. HUDDLESTON: I think a motion is
21 appropriate.

22 CHAIRMAN O'HARA: Okay. The chair can make
23 motions. I can certainly make -- I'll make a motion that
24 we -- regarding public comment, that we move public
25 comment to the end of the agenda. However, we will accept

1 speaker slips for any topics. And it is the discretion of
2 the chair and the members whether they want to elicit,
3 solicit, comments from the public. Comments from the
4 public should be directed to the chair, and there should
5 be no questions between members of the public directly.

6 MS. LEWIS: And can we add that they need to
7 be only relating to what's being discussed?

8 CHAIRMAN O'HARA: Absolutely.

9 MS. LEWIS: Or what was discussed.

10 CHAIRMAN O'HARA: Stay on topic, absolutely.

11 MR. TSIOLIS: With respect to topics'
12 specific comments, are we going to limit that to two
13 minutes, three minutes?

14 CHAIRMAN O'HARA: I think it should be
15 limited to three minutes unless the chair extends the
16 time.

17 MR. TSIOLIS: That's part of your motion?

18 CHAIRMAN O'HARA: Yes.

19 MR. TSIOLIS: I'll second that motion.

20 CHAIRMAN O'HARA: Real quick, let me add
21 one. As part of that motion, I would ask that both public
22 and members refrain from personal comments or personal
23 attacks. That should be an automatic, but sometimes it's
24 not. That's the motion. Second?

25 MR. TSIOLIS: You have a second.

1 CHAIRMAN O'HARA: Okay. Does everyone
2 understand clearly the motion?

3 MS. MARTINCIC: Will speaker slips be
4 submitted for both end-of-the-hearing testimony and then
5 also for specific topics?

6 CHAIRMAN O'HARA: Yes.

7 MS. MARTINCIC: So all?

8 CHAIRMAN O'HARA: Yes.

9 MS. MARTINCIC: Okay.

10 CHAIRMAN O'HARA: Okay. Any questions on
11 the motion? Clarifications?

12 MS. WOODALL: Mr. O'Hara, as your attorney,
13 if I may ask one question. Laurie Woodall, Assistant
14 Attorney General. I'm counsel for the Policy Commission.
15 Was it your intention to also allow speakers at the end to
16 request the Commission address other issues at their next
17 meeting? Because your motion, as framed, would limit
18 public comment only to the items on the agenda for that
19 day. Was it your intent --

20 CHAIRMAN O'HARA: Let me clarify that. My
21 understanding also is that public comment -- general
22 public comment at the end is pretty much open to any
23 topic.

24 MS. WOODALL: It is.

25 CHAIRMAN O'HARA: There is no limitation

1 that we are putting on that.

2 MS. WOODALL: Right. I wanted to make sure.
3 Your motion, as framed, suggested that public comment
4 would be taken only with respect to the matters on that
5 day's agenda.

6 CHAIRMAN O'HARA: Oh, no.

7 MS. WOODALL: What I understood the
8 consensus was was that if a member of the public at the
9 end of the meeting wanted to request the Commission to
10 address an issue at a subsequent meeting, you would, in
11 fact, entertain such a comment?

12 CHAIRMAN O'HARA: Certainly, we would. I
13 think the comment on the public comment would be
14 pertaining to the topic -- are those topics that are on
15 the agenda already, that those comments that pertain to
16 those topics stay on topic.

17 MS. WOODALL: Thank you.

18 CHAIRMAN O'HARA: The end of public comment
19 is basically open, and they can request any kind of agenda
20 items to be added to the next meeting. Is that clear?

21 Okay, great. Any other clarifications? All
22 those in favor of the motion please say aye. All those
23 opposed please say nay. Okay. The motion passes. Thank
24 you.

25 Moving on to Item 3C, public service training.

1 I've invited Laurie Woodall who is our counsel for the
2 Commission to explain particularly to our new members but
3 possibly our existing members the requirements for public
4 service training. You can sit.

5 MS. WOODALL: I only think best when I'm on
6 my feet, so I might be thinking only half as well as I
7 normally do.

8 Good morning. I am Laurie Woodall. I am the
9 assigned Assistant Attorney General who represents the
10 Policy Commission. I'm in the environmental enforcement
11 section, so Tamara Huddleston is my supervisor. Barbara
12 Pashkowski is the Assistant Attorney General that actually
13 represents the UST program. So I thought I would sort of
14 explain what each of our respective roles is.

15 There is a requirement in the statute which is
16 in your packet that all new public officers, which is what
17 you are now since you have been appointed to this
18 position, must undergo or must participate in public
19 service -- I didn't want to say you had to undergo. I
20 thought that made it sound like a root canal.

21 MS. HUDDLESTON: She's right.

22 MS. WOODALL: You have to take public
23 service orientation. It is put on by the Department of
24 Administration by statute. However, historically that
25 training has been presented by the Office of Excellence in

1 Government. There isn't anyone answering the phones over
2 there right now. So I'm in the process of trying to find
3 out who at the Department of Administration is going to be
4 working with to present you with that training. You do
5 have six months; and hopefully before the end of that
6 time, I will have an answer as to who will be providing it
7 for you.

8 I know my office has videotapes on that that we
9 use in our training for state officials. I'll see what I
10 can work out for you. But anyway, I will have an answer
11 for you, and I will give you some dates as to who's
12 presenting the training.

13 I included some other information in the package
14 that I thought might be helpful for you Commission
15 members. I wasn't sure to what extent there was
16 familiarity with some of the requirements. And so I have
17 provided for you two chapters from the Arizona Agency
18 Handbook, which is a document that my office is required
19 by statute to publish to advise state agencies and state
20 officials concerning their official duties. So you have
21 in there a chapter that relates generally to the
22 obligations and requirements of a public officer. And
23 there is going to be one modification in those materials
24 as it relates to Policy Commission members. And that is
25 the rules on conflicts of interest are different for you

1 than they are for practically anyone else in state
2 government. And at some point, I will be happy to come
3 back and go through those with you, if that's what you
4 would like to do.

5 I have also included a copy of a chapter on open
6 meetings law because that is something that limits how the
7 Commission does its business and also limits the content
8 of what can be discussed at your meetings. And at some
9 point, if there is a desire, I will be more than happy to
10 give you a quick run-through of these materials. So if
11 anyone has any questions, I will be more than happy to
12 answer them.

13 CHAIRMAN O'HARA: Any questions from
14 committee members? Thank you.

15 I don't know if you want to stay up. Let's move
16 on to Item D, and I think this is really come up -- we
17 battled this issue many times over the past several years.
18 Oftentimes some of the topics that we deal with here as a
19 Commission are also the subject of an appeal hearing or an
20 ongoing administrative hearing. And it's difficult to
21 know where the line is drawn and what the Commission can
22 or can't discuss and/or some of the members that are on
23 the Commission such as the Attorney General or
24 representatives in the public, how much can be discussed
25 because all this is being taken down. If there is

1 issues -- I wanted to get some clarification and maybe
2 discuss it as a Commission as to how we should treat
3 issues that come up that are part of the subject of an
4 appeal.

5 MS. WOODALL: There are two basic issues
6 that we need to keep in mind when we are thinking about
7 this. The first is: What is your statutory charge? What
8 is your power and authority? And that is generally set
9 forth in A.R.S. 49-1092 which says what you can do and
10 what your business is. And so you can't really do
11 anything unless it falls within this statutory framework.

12 The second issue is basically one of efficiency.
13 Many of the matters that I've heard brought up from the
14 floor relate to specific individual matters. And while
15 I'm sure they are very important to the parties involved,
16 because you are a Policy Commission and you are supposed
17 to be looking at big pictures, you have to make a decision
18 about whether or not you want to focus your attention on a
19 specific matter or whether you want to sort of keep your
20 focus at more high-level policy issues. And that's one
21 for you to decide.

22 There are a couple of practical impediments to
23 the Department discussing specific pending matters with
24 you. The first is if it's a matter that one of the
25 Department representatives is going to be a decision maker

1 on, in other words, it has not made its way up the more
2 formal administrative chain, the decision maker has a
3 problem in answering questions about a specific case
4 because of due process concerns.

5 They're only supposed to be listening to
6 information that comes before them in a way that's fair to
7 both sides. And it's not -- it could create practical
8 problems for them to justify their decisions if they have
9 been having discussions about these matters outside their
10 normal procedures for evaluating a claim, for example.
11 And that's one of the reasons why some of you have
12 probably seen some hesitancy on the part of Department
13 representatives.

14 The second is if it's a matter that is currently
15 in an administrative process, it places the Department at
16 a significant disadvantage to have their representatives
17 basically cross-examined in front of you on topics and
18 asking questions which would probably, in some
19 circumstances, not be legally permissible over at OAH.
20 The party involved can then use that information over in
21 the administrative proceeding, and they can use it in a
22 way that might not be particularly advantageous. So it
23 can be construed as being a tactical effort on the part of
24 the participant to get the Department at a disadvantage.

25 Now, you could be saying, Well, why wouldn't

1 they give the same information over at OAH that they would
2 give to us? Number one, we might have different
3 witnesses -- or the Department might have different
4 witnesses over at OAH, so there could be inconsistencies
5 in terms of the precise language that's used by, for
6 example, Mr. Bingham, versus someone else who's the
7 Department's witness in a case.

8 So the Department is at a disadvantage by being
9 asked to answer questions and justify their position in
10 particular matters when they are currently undergoing
11 litigation. It really does present some serious practical
12 and legal problems for the attorneys. Sir.

13 MR. TSIOLIS: George Tsiolis. I have a
14 couple questions. When the parties go through an informal
15 settlement process, the statute provides specifically that
16 statements made in the informal settlement conference
17 cannot be used later on. Would it benefit the Commission
18 if a similar statutory revision were made that any
19 statements made by the Department to discuss policy that
20 might be the subject of ongoing administrative litigation
21 would also similarly be protected?

22 MS. WOODALL: You could certainly consider
23 that. I am not one to advise you about the practical
24 likelihood that such a legislative initiative -- that you
25 could get anyone to draft a bill or that it would pass. I

1 sort of sincerely doubt it. It basically boils down to a
2 real policy decision for you. Do you really want to get
3 involved in the individualized disputes between the
4 Department and parties? Is that your role? Is that what
5 you want to do?

6 MR. TSIOLIS: Towards that second point, my
7 understanding is that the Commission has an obligation
8 both to advise the Department, however it gives input to
9 the Department, but also to advise the legislature short
10 of immunity for statements made by the Department in
11 discussions concerning issues that are before an OAH ALJ.
12 Would it be possible for the members of the Department --
13 or representatives of the Department to just recuse
14 themselves from the discussion so that the Commission can
15 go forward, have a discussion on the issue, and then
16 possibly make recommendations to the legislature, for
17 instance, during the legislative session?

18 MS. WOODALL: Certainly your function in the
19 statute is to make precisely such policy recommendations.
20 The question that we were asked to address is whether or
21 not the Commission should be talking about specific cases
22 that are -- you can certainly talk about an issue that has
23 arisen in a specific case. For example -- I am going to
24 make something up. The Department's position with respect
25 to timeliness and when a date starts and when it ends, for

1 example. Let's use that as an example.

2 If an individual party comes and says the
3 Department is taking this position in a case and it is
4 unreasonable and whatever their arguments are, do you want
5 to address it in the context of that particular case? Or
6 do you want to address it more in the context of, Well, we
7 would like the Department to explain to us why they are
8 using this policy or this timeliness calculation? And we
9 want to make a recommendation to you -- You can certainly
10 include that in your report to the legislature. The
11 question is whether you frame it in terms of a particular
12 case.

13 MR. TSIOLIS: I would recommend to everyone
14 here that it be the latter approach that's being
15 recommended, that we discuss in terms of why. Ask the
16 Department to explain what the position is, why this
17 particular policy -- this particular interpretation is
18 being made of a particular rule or a statute rather than
19 in the context of a specific case. I would definitely
20 recommend that.

21 MS. WOODALL: Ms. Pashkowski has also
22 advised me that one of the other issues that have come up
23 in these hearings is you will have members of the
24 Technical Appeals Panel that may be present in the room
25 and that they are potential decision makers who would have

1 to excuse themselves or leave because they could -- there
2 could be a potential argument there.

3 MR. TSIOLIS: Are they on the Commission?

4 MS. WOODALL: I don't know.

5 MR. TSIOLIS: Are there members of the
6 Technical Appeals Panel on the Commission?

7 CHAIRMAN O'HARA: No longer?

8 MS. CLEMENT: No. I've resigned.

9 MR. TSIOLIS: So they could leave the room?

10 MS. WOODALL: Yeah. If someone would know
11 that they are there and could tell them to leave the room.
12 I don't happen to advise them.

13 MS. CLEMENT: As a recent member of the
14 Technical Appeals Panel, I think if we talked about
15 policy, I think that's our role here, that discussion
16 about policy and our recommendations will affect
17 individual cases because policy issues come up in these
18 cases. Even if we don't talk about specific cases, what
19 we recommend may have a very specific impact on that case.
20 I'm not saying we shouldn't. I think that's our role.

21 But I think we should recognize. And I can
22 think of an example, if you would like. I think one of
23 the issues in front of the Technical Appeals Panel -- and
24 I just heard Barbara this morning, they have not received
25 our technical findings of facts yet and the administrative

1 decision on it -- refers to UST clean-ups in WQARF areas.
2 That's clearly a very high-level policy that the agency
3 and the Commission need to consider. But what -- the
4 decision on that will affect that specific case that is
5 still yet to be decided or apparently has not been
6 published. So how do you play that off against each
7 other?

8 CHAIRMAN O'HARA: Do you mean our
9 recommendation is going to have an effect?

10 MS. CLEMENT: It may.

11 CHAIRMAN O'HARA: Or the director's ultimate
12 decision?

13 MS. CLEMENT: The director's ultimate
14 decision. But our discussion about it could also impact
15 that specific case.

16 MS. WOODALL: In a practical sense, that's
17 certainly possible. But your specific charge here is to
18 make these recommendations, which you do in a report.

19 And there is another part of the statute that
20 talks about how you have at least 30 days to review and
21 make written recommendations to the director before the
22 Department adopts substantive policies or guidelines that
23 affect substantial rights. So there is an ongoing review
24 role, if you will, that the Commission has and what the
25 Department is doing and their guidelines and policies.

1 And certainly you can address those.

2 The concern that I was asked to address is what
3 are the problems about addressing these in the context of
4 a specific case, and that's why.

5 CHAIRMAN O'HARA: We don't do that.

6 MS. HUDDLESTON: Mr. Chair, Laurie, isn't it
7 also possible that even in discussing it in a general
8 term -- I in no way want to limit this Commission's
9 authority to discuss policy issues in general terms.
10 That's the charter, and that's what this Commission is
11 here for. It's very useful to the Department.

12 But in a limited number of instances, it may be
13 that the issue is such that even to discuss it in general
14 terms the Department would have a hard time because of the
15 hearing. And the Department would be forced to say, "We
16 can't discuss that because of a hearing." And then the
17 Commission went on and made a recommendation based upon
18 what they just heard, they wouldn't have a fair hearing.
19 It would be a lopsided decision is basically what I'm
20 trying to say.

21 MS. WOODALL: I think some of the other
22 procedures that the chairman is looking at in terms of
23 having public comment near the end, and if it's the public
24 comment that says, We think you should look at the
25 Department's issues -- procedures with respect to X or Y,

1 you can certainly make a decision at that time whether you
2 want to address it at your next meeting.

3 MS. HUDDLESTON: Or at a later date.

4 MS. WOODALL: Or, yeah, whenever you want to
5 do it. Then folks have an opportunity to -- you have an
6 opportunity, first of all, to decide whether you actually
7 want to hear about this at a meeting or whether you simply
8 want people -- they can always send you information in
9 writing, if they want. So you have that ability to
10 organize yourself in that way.

11 It is not that you need to cut yourself off from
12 addressing the policy -- the policy issues that are
13 presented by a particular case. It's that you can't
14 really -- You can certainly talk about an individual case.
15 The question is: Do you want to expend your energies and
16 your time that way particularly in view of your
17 understanding of what difficulties that presents for the
18 Department and the fact that you may be limited in the
19 information and response that you get because it is
20 couched -- the inquiry is couched in the context of a
21 particular case?

22 MR. TSIOLIS: And our recommendations to the
23 legislature go when?

24 MS. WOODALL: I think it is in an annual
25 report.

1 CHAIRMAN O'HARA: Typically our
2 recommendations are sent forward shortly after they're
3 made. The annual report just contains everything we've
4 done for the year.

5 MR. TSIOLIS: It is a restatement in the
6 annual report. We can make recommendations to the
7 legislature on an ongoing basis?

8 CHAIRMAN O'HARA: Sure.

9 MR. TSIOLIS: I think I completely agree
10 with what Tamara just said. My only concern is that a lot
11 of the issues that I would suspect are the hot issues that
12 the Commission would want to consider are those very
13 issues that are prone to litigation unfortunately.

14 And you know, there is many ways that an
15 administrative appeal can be resolved. And one of them is
16 legislatively. A fix can be made that would moot the very
17 need for the appeal to continue. And I don't know to what
18 extent the Department would actually have to recuse itself
19 from discussing a position that it's already taken
20 publicly before the OAH ALJ. I don't think it would need
21 to. It could just restate for the benefit of the
22 Commission members what that -- it is essentially a policy
23 statement.

24 When you take a position in litigation and you
25 are an agency, you are basically interpreting statute and

1 your authority. You are essentially making a policy
2 statement. Just restating that for the benefit of the
3 Commissioners would greatly aid in the discussion that
4 might ultimately lead to a recommendation for a resolution
5 that would possibly make the need for litigation
6 continuing to go away.

7 MS. WOODALL: One of the things I would like
8 to direct the Commission's attention to is 49-1092(d)(3)
9 because I think there is an avenue where you can play a
10 very active role concerning the Department's policy and
11 guidelines in a more rapid way. The statute says that,
12 "The Underground Storage Tank Policy Commission shall have
13 at least 30 days to review and make written
14 recommendations to the director before the Department's
15 adoption of substantive policies or guidelines of the
16 program that affect the substantive rights of owners and
17 operators or other regulated parties. The director shall
18 consider the written recommendations of the Commission
19 before implementing the policies or guidelines." So you
20 have an opportunity before anything actually gets drafted.

21 MR. TSIOLIS: But to the extent that a
22 policy statement is not made through a policy statement --

23 MS. WOODALL: It says guidelines also.

24 MR. TSIOLIS: Or guidelines. To the extent
25 that a guideline or policy statement is not made through

1 policymaking in the legislative sense but, rather, is made
2 through case in controversy in an individual case, does
3 that suggest that we have the ability to influence the
4 following administrative decision?

5 MS. WOODALL: I'm sorry?

6 MR. TSIOLIS: I'm saying to the extent that
7 a policy can be made two ways, one, the legislative
8 process, policymaking or issuing guidance, and other way
9 through case in controversy, through adjudication before
10 OAH, does that suggest that we have the ability to
11 influence a final administrative decision before it is
12 made?

13 MS. WOODALL: I don't see in the technical
14 legal sense that you are because I don't think you have
15 the authority to do that. In a practical sense, certainly
16 the consensus of views of this Commission is undoubtedly
17 going to have an effect on the Department.

18 MR. TSIOLIS: See, I'm just concerned --

19 MS. WOODALL: What that effect would be, I
20 don't know, Mr. Tsiolis.

21 MR. TSIOLIS: Half of the Department's
22 policy probably -- I haven't seen policymaking in a while
23 actually. I think more than half of the Department's
24 policy is made through case in controversy. And if we can
25 participate in that debate and the end result is just

1 because the parties are resolving it through a recommended
2 decision that goes back to the agency head, that just
3 pretty much leaves the Commission out of a lot of
4 policymaking.

5 MS. WOODALL: I don't really think so
6 because the Department is supposed to be acting pursuant
7 to its policies and guidelines, and those are supposed to
8 be the framework that guides how it conducts its business
9 in this particular program. And you do have a role. You
10 are supposed to be looking at them, and you are supposed
11 to be making recommendations concerning them. So you
12 should be having a say for an end to this. That's the way
13 your statutes read.

14 I guess -- And I don't know if that's happened
15 in the past or not. I don't know historically what's been
16 done. I'm just telling you what your statutes say.

17 MR. TSIOLIS: I'm not going to belabor my
18 point. I think I made it clear. I just want to add one
19 thing. And that is that -- and I agree the Department
20 needs to follow its own policies, but we don't know what
21 those policies are until an initial interim decision is
22 made.

23 MS. WOODALL: You are suggesting that there
24 are some actions that the Department takes that are a
25 surprise to both regulators --

1 MR. TSIOLIS: Yeah. I mean, that's really
2 what leads to litigation, is where it is unclear what the
3 Department's position is before it makes an order that is
4 an appealable agency action or a contested case.

5 MS. WOODALL: As I said, I think you do have
6 a legitimate role in looking at the Department's policies.
7 That's what the statute says. That's what the legislation
8 says. I suppose I'm doing a typical lawyer of yes, you
9 can talk about it, you just don't talk about it in the
10 context of a particular case.

11 And I recognize that if you are talking about it
12 abstractly, there's a realistic perception that everyone
13 knows that you are really talking about the Brown case,
14 for example, picking something out of the air. But you're
15 not creating due process concerns and you are not creating
16 an unfair litigation scenario for the program attorneys.

17 MR. TSIOLIS: I would agree, and I would
18 recommend that approach.

19 CHAIRMAN O'HARA: Any comment? Ms. Clement.

20 MS. CLEMENT: My question is: How do
21 policies or potential policies come before the Commission
22 because I see the same thing that George has been talking
23 about having been on the panel. A lot of decision-making
24 regarding policies seemed to be working its way through
25 the informal hearing process. And my question is: What's

1 this Commission's role, and how do you get information
2 regarding those policies before they become policies?

3 MS. WOODALL: I note that on the agenda,
4 there is an item for a discussion and overview of the
5 program and the Policy Commission. And I would suggest
6 that you, perhaps, could request that whichever
7 departmental representative is going to be presenting that
8 could address it in the context of that agenda item.

9 CHAIRMAN O'HARA: That's a good suggestion.
10 It is Item 9, 9B.

11 MS. CLEMENT: I'll hold that question then.
12 Thank you.

13 CHAIRMAN O'HARA: Great, thank you. Any
14 other questions for Laurie?

15 Laurie, just quickly, so I understand what you
16 said, it is not a problem for the Commission to discuss
17 general policies?

18 MS. WOODALL: Absolutely not.

19 CHAIRMAN O'HARA: As long as we are not
20 talking about specific case issues. There may be a
21 problem with certain representatives of the AG's Office or
22 DEQ from being able to participate in that discussion?

23 MS. WOODALL: Yes. And I would strongly
24 recommend that the Commission, if they are going to be
25 talking about a policy issue, that it not be in the

1 context of a particular case. And so -- And, again, there
2 are larger issues of how you want to expend your time.
3 You have already addressed some of those with respect to
4 public comment, about whether you basically want to
5 provide a second bite at the apple for members of the
6 regulated community.

7 Yes, Mr. Beal.

8 CHAIRMAN O'HARA: Thank you.

9 MR. BEAL: I can ask this question then.
10 Stop me if I cannot. But if we talk about an issue in a
11 general context that is under appeal in a specific
12 context, is it wrong to expect a recommendation from this
13 Commission to have an effect on the specific outcome?

14 MS. WOODALL: You know, as a lawyer --

15 MR. BEAL: Isn't that why we're here?

16 MS. WOODALL: If you are saying "wrong," you
17 mean inaccurate or are you saying --

18 MR. TSIOLIS: Making a value judgment.

19 MS. WOODALL: Lawyers don't do that.

20 MR. TSIOLIS: That's a business decision.
21 The client makes that decision.

22 MS. WOODALL: It's basically -- that is
23 really not a legal question.

24 MR. BEAL: If we are here to discuss a
25 policy in a general context and we come to make a

1 recommendation to whatever, whether it be the director, it
2 be the legislature, however, and that position becomes
3 known, isn't that why we're here?

4 MS. WOODALL: I think it is --

5 MR. BEAL: Prior to the determination of the
6 specific case that may have caused this discussion to take
7 place?

8 MS. WOODALL: I think it is reasonable for
9 you to expect that the director and the Department will
10 seriously consider your position on matters. However,
11 it's the Department's regulations and policies. And your
12 role is not to approve or really deny them. It is to make
13 recommendations. And I think it is reasonable for you to
14 expect that they are going to be seriously considered.
15 But you don't have a role in approving or denying them.
16 Your role is to make recommendations. And so I guess I
17 think it is reasonable for you to expect that your voice
18 is going to be heard very, very clearly.

19 MR. BEAL: I don't believe I said "approve
20 or deny policy." I said "discuss and make a
21 recommendation."

22 MS. WOODALL: Right. I would say yes, it is
23 reasonable for you to expect that you are going to be
24 listened to. Whether it is wrong for you to believe you
25 are going to have an influence on the outcome, it may not.

1 The Department may make an exercise of its authority, may
2 listen to what you have to say. The director may consider
3 it. He may know exactly what your views are on something
4 and say, We are still not going to do it because I think
5 it is better to do it this way. That's what I was saying
6 when I was saying is it wrong for you to expect you are
7 going to influence the outcome. Maybe it will, and maybe
8 it won't.

9 CHAIRMAN O'HARA: Hal.

10 MR. GILL: The Policy Commission was
11 initially set up, we'll hear in a few minutes -- or made
12 up of individuals that had experience in all aspects of
13 UST. And one of our tasks was, as has been stated, to
14 make recommendations to the Director on policies.

15 But basically the way it's been working is any
16 recommendations that we would make would all be after the
17 fact, which as you just stated, that doesn't make any
18 sense. If we have experience and using the experience, we
19 have to make recommendations to the director, it seems
20 like that should be part of the process rather than having
21 to go back after the decision is made, discuss it again,
22 go back in and possibly have the decision overturned or
23 reversed. It just seems like the process is not working.

24 MS. WOODALL: The practical -- I mean, there
25 is always -- when you deal with government, there is

1 always going to be a lag. That's an inherent part of the
2 process, is that there is a lag between the identification
3 of the problem and the identification of the solution.
4 And while I understand the point that you're making, I
5 don't know that I see anywhere in your statutes that it
6 indicates that you are, in essence, a second level of
7 review for specific matters and policies that the
8 Department wants to implement.

9 I realize -- I understand the point that you are
10 making, but I don't see that that's where your role is as
11 defined in the statutes. And my job is really to help you
12 understand what your role is as defined in the statutes.
13 And I recognize that there is a public policy component to
14 this that is exclusively yours. You make the decision of
15 what policies you are going to address, how you are going
16 to convey them, how you are going to conduct your
17 business. Those are all -- that's all within your
18 purview.

19 But the issue of what your authority is, is
20 something that the legislature has defined here. And I
21 don't see that that has been defined as your role. Now,
22 maybe it should be and maybe it shouldn't. This is
23 something that you can certainly deal with in another
24 venue.

25 MS. MARTINCIC: I would just clarify, the

1 charge of the committee -- or the Commission is to review
2 general policy issues --

3 MS. WOODALL: Yes.

4 MS. MARTINCIC: -- and make recommendations
5 on them. Whether or not DEQ or the AG's Office can
6 participate in that, the Commission can still discuss and
7 debate those policies and make recommendations.

8 MS. WOODALL: Absolutely, absolutely. And
9 then you have additional discretionary functions that are
10 contained in Subsection E of your statute which provides
11 you with a little more flexibility in addressing specific
12 matters.

13 I wasn't prepared to give you a full explanation
14 of your duties today, but I would be more than happy to
15 come back and go through them, although I understand that
16 representatives of the Department are going to generally
17 go through the responsibilities of the Policy Commission.

18 CHAIRMAN O'HARA: Thank you, Laurie. I
19 think we'll continue this issue under 9B.

20 Any other comments or questions for Laurie?

21 MS. WOODALL: I would be more than happy to
22 come back at another time and sort of address any general
23 issues that are associated with open meetings, your
24 functions, anything -- anything at all that I can help you
25 with. I generally deal through Mr. O'Hara. Thank you.

1 It was a pleasure meeting you.

2 MR. PEARCE: Is there a chance for public
3 comment before Laurie leaves?

4 CHAIRMAN O'HARA: John, I don't think you
5 were here. We actually made a decision that we are going
6 to move public comment predominantly to one public comment
7 period. We are going to start using speaker slips.

8 However, given the fact that -- I'll ask the
9 Commission. Since this is the new rule instituted today,
10 we didn't give prior notice, do you feel we can take
11 public comment today or should we implement these rules
12 immediately?

13 MR. PEARCE: It is just it is impossible to
14 engage a speaker like Laurie if she is going to leave and
15 we don't have a right to comment until later.

16 MS. WOODALL: Mr. Pearce, my telephone
17 number is 602-542-8864. And I would be more than happy to
18 discuss any of my comments here today with you as one
19 professional to another.

20 MR. PEARCE: Can we conference in the Policy
21 Commission?

22 MS. WOODALL: No. Thank you.

23 MR. PEARCE: Thank you.

24 CHAIRMAN O'HARA: Let's move on to Item 3E,
25 election of vice chair. I think we have gone quite a

1 while without a vice chairperson, chairman, chair. I
2 would open the floor to really any recommendations or
3 volunteers who would like to be the vice chair. I don't
4 think -- I have been the vice chair prior to being chair.
5 And it is not really time consuming at all, only in the
6 instance where the chair is unable to make a meeting or
7 something. I wouldn't expect it to be very time
8 consuming. Although, I would expect that person would
9 probably become chairman at some future date, maybe very
10 soon. So think very carefully before you volunteer.

11 MR. TSIOLIS: Mr. Chairman, if I might
12 recommend somebody with seniority.

13 CHAIRMAN O'HARA: Okay. I know Hal has been
14 real busy as a chairman for the subcommittee, so it may be
15 unfair to ask you to do that, Hal. Is there anybody who's
16 got some seniority? I'll open it to anybody, but that's a
17 good suggestion. Nobody jump at once. Someone who is
18 going to be here hopefully quite often. I may have to
19 start pointing, drafting somebody. Anybody?

20 MR. GILL: I can volunteer for vice chair.
21 I don't know that I would be able to step in for chair
22 because you and I work together real closely to get
23 agendas written together anyway. I don't think I can step
24 into the chair.

25 CHAIRMAN O'HARA: I appreciate that. No one

1 else? Given the fact no one wants to volunteer, someone
2 like to make the motion to approve Mr. Gill.

3 MR. SMITH: I will make the motion to
4 recommend that Hal Gill become the new vice chair of the
5 UST Policy Commission.

6 MR. TSIOLIS: I'll second that motion.

7 CHAIRMAN O'HARA: All those in favor of
8 nominating and voting Hal Gill as the vice chair of the
9 UST Policy Commission please say aye. All those opposed.
10 Thank you.

11 Mr. Gill, you are now the new vice chair.

12 Moving on to Item 4 -- Item Number 4, an ADEQ
13 presentation on the history of the UST and State Assurance
14 Fund programs and the UST Policy Commission. I'll turn
15 this over to Mr. McNeely.

16 MR. MCNEELY: For the record, I'm Phil
17 McNeely with DEQ. Shannon did this presentation for the
18 House Environment Committee about three weeks ago. It is
19 general in nature. And we added some slides because Mike
20 wanted to add some slides on the history of the Policy
21 Commission, so it is very general. Most of you guys know
22 it. At least the new members will see the whole history
23 of the program. And really there is four parts to it.
24 One is the Policy Commission. One is our compliance
25 program. Another one is the corrective action program and

1 then the SAF. And it is in that order.

2 The Policy Commission, it was established in
3 '98. 1092 is the statute. It has 11 members, and they
4 are all appointed by the Governor. And everyone is
5 supposed to have UST experience. What the policy -- There
6 is a lot of things you have to do, and I'll show you the
7 next slides. Transmit specific recommendations to improve
8 the program, and you also submit an annual report to the
9 director of ADEQ, the Speaker of the House and the
10 President of the Senate and the Governor.

11 These are the items that the Commission was
12 supposed to be reviewing. They shall evaluate the
13 adequacy of the protection of human health and the
14 environment of the program, the cost-effectiveness of the
15 corrective actions, the appropriate use of SAF monies, the
16 need for additional SAF monies or other monies to meet the
17 needs of the program. And these are all out of the
18 statute, 1092.

19 You are supposed to evaluate and recommend dates
20 to phase out the SAF and transfer responsibility for
21 corrective actions to private insurance industry. That's
22 in the statute. Ways to reduce future claims to the SAF
23 and encourage compliance with new tank standards by
24 lowering claims ceilings and increasing co-payments. And
25 I have this over here if you want to look.

1 Okay. These are goals from Mike's presentation
2 in 2002. They were going to continue monitoring the
3 groundwater study. They were going to evaluate the
4 phase-out of the SAF, evaluate the effectiveness of the
5 cost ceilings and continue to monitor and make
6 recommendations on new UST policies. I really didn't have
7 time to sit down with Mike and come up with
8 accomplishments. But some of the things you guys were
9 talking about previously about your role, last year the
10 corrective action rules were reviewed by the Policy
11 Commission. In terms of your role, we actually went
12 through word by word for the guidance document and the
13 rules.

14 So I think the comment was made what's our role
15 and how do we influence our -- it is not after the fact.
16 It was actually an active stakeholder process and the
17 Policy Commission and the Technical Appeals -- or the
18 technical committee was actively involved every step of
19 the way. When I managed the program back in '98, I
20 thought I was done with the rules and the guidance
21 document pretty much. And two and a half years later, we
22 were still going through every word of it. And it grew by
23 about three inches. So the Policy Commission does have an
24 active role, and stakeholders have an active role in our
25 guidance before they were implemented, so just to make

1 that comment.

2 Also the groundwater study is, I guess, in draft
3 form. And Myron is going to talk about that today. That
4 was another accomplishment last year. I'm sure there are
5 other ones, but I really didn't have time to put them up
6 here.

7 CHAIRMAN O'HARA: We have a draft of the
8 annual report, which we are going to send forward. We are
9 going to actually circulate it to everyone in the next
10 couple of days. It has all the accomplishments and things
11 we did in the last year. So we'll have a lot of
12 discussion. Thank you.

13 MR. MCNEELY: I'll move on to the compliance
14 program, and that's Ron Kern's program. That's mainly
15 funded by a \$100 tank fee per year. There is 8,000
16 registered tanks -- USTs in Arizona. With our current
17 funding and our current staff, we go out and do
18 inspections every seven years. And I think we think
19 that's a little bit too high, so that's an issue I think
20 for the Policy Commission to address.

21 The '98 upgrade standards have really
22 significantly reduced the UST releases reported. I'll
23 show you a graph in the next slide. The standards
24 included overfill and spill prevention and corrosion
25 protection. Just for people that may not know, in '98,

1 the federal law had upgraded protection. So Arizona, I
2 think, has pretty much 100 percent compliance with all the
3 new tanks and the new leak prevention systems.

4 To show you the effect on releases, these are
5 number of releases per year, '95, '96, '97, 816, 978, 611,
6 541. Over the last two years, after the upgrades, you see
7 it start going down, 108, 101. Hopefully, we are levelled
8 off, and I'm hoping that the releases don't exceed the 100
9 range for every year for eternity.

10 A lot of these releases were discovered while
11 they were doing the upgrades. While they are pulling the
12 tanks out of the ground upgrading, that's when a lot of
13 these releases were reported. So I'm not sure if it is
14 really only 101. Maybe we just haven't discovered them
15 yet. Usually when you dig up tanks, you find a release.
16 That's still impressive. Our program really should be
17 levelling off, and it should be in maintenance phase. And
18 the big bulk of the work should have already been done,
19 which I think it has been.

20 MR. GILL: Phil, the LUSTs reported
21 annually, is that actual releases or LUST numbers?

22 MR. McNEELY: LUST numbers which are
23 supposed to be releases. These aren't facilities. These
24 are LUST numbers. So we had 101 LUST numbers last year.
25 I have another graph at the very end, which is my favorite

1 graph, shows you how many we closed in relation to how
2 many we opened.

3 Moving on to UST corrective action, what's our
4 mission, to protect public health and the environment.
5 And the way we do that is we review work that's being done
6 by the regulated community, and we make comments on their
7 reports. Also, we have a state lead program that actually
8 does the corrective action. And there is certain criteria
9 to get into the state lead program. One is the
10 owner-operator is not financially capable of doing the
11 work or technically capable or we can't find an operator
12 or owner to do the work.

13 What's our status of our UST corrective action
14 program? We have 1,433 open UST sites. These are sites,
15 facilities. They are not LUST numbers. Of if you want to
16 look at LUST numbers, it is about 2300. That's why the
17 program is a big program. It is difficult to manage all
18 these sites. Out of those 1433, 597 are groundwater
19 impacted. They have been assigned to case managers.

20 We've changed things a little bit in the
21 corrective action section. Rather than the case managers
22 only reviewing the groundwater sites, now they are doing
23 first-in, first-out reports since we did loan a lot of our
24 staff to the SAF for review. A report comes in. It may
25 not necessarily get reviewed. The case managers are

1 actually reviewing other reports that aren't assigned to
2 them because we don't have the staff to cover all the
3 sites.

4 Productivity. What did we do in 2002? This is
5 calendar year. We reviewed 145 closure requests, 77 site
6 characterization reports, and 28 CAPs. That's 250
7 reports. Out of those 250, we had 12 informal appeals.
8 These are only technical appeals, not SAF related, purely
9 technical. We had 12 appeals, which is a 5 percent rate
10 on our interim decisions. We also had five appeals for
11 failure to respond. So it is not bad, 250, only 12
12 appeals on technical decisions. That's for calendar year.

13 What's the process? It is basically if there is
14 a release, the owner-operator reports within 24 hours.
15 The DEQ assigns a release number. Owner-operator is
16 required to do a site characterization within about a
17 year. At that point, if it is applicable, they can submit
18 a corrective action plan or we can request a corrective
19 action plan and then closure requests. This whole process
20 usually takes a decade or so. But it is really -- if you
21 really look at it, it is a basic program. It is not that
22 complicated.

23 What does state lead do? We conduct corrective
24 actions, protect public health and environment. The
25 action is taken at sites where the UST owner is unknown,

1 unwilling, or unable to perform the necessary action. And
2 we prioritize by risk the sites we have.

3 What's our workload in state lead? We have 59
4 active sites. Twenty-four sites have been remediated and
5 closed, and we have pulled 18 tanks at six facilities.
6 They managed them as the municipal tank closure project.
7 And they review applications for that. I think there is a
8 few pending applications right now.

9 These are our corrective action rules. They
10 became effective last August. They identify requirements
11 for reporting releases. They identify investigation and
12 clean-up requirements. It also allows the implementation
13 of the risk-based corrective actions. And as I mentioned
14 before, it was developed with the assistance of the Policy
15 Commission and stakeholders. This was a rule. I think it
16 was a decade in the making. It took a long, long time.

17 What's RBCA? Risk-based corrective action. You
18 can determine or the owner-operator can determine a site
19 specific clean-up standard. Just to be more specific, we
20 have look-up tables in the soil rule that are
21 off-the-shelf numbers. And we also have MCLs, or water
22 quality standards, in groundwater. This rule allows you
23 to come up with a site-specific standard. It is equally
24 protective but it is just using site-specific data when
25 you punch the formulas.

1 It also allows for closure utilizing land use
2 restrictions, which we call them the DEURs, declaration of
3 environmental use restrictions. Engineering controls, we
4 are right now working on getting a new -- revising the
5 statute to make it more workable. It says "more efficient
6 and traditional clean-up." It just gives us more options
7 to get sites closed, and it is potential for cost savings
8 for owners and operators and the Department.

9 State Assurance Fund, the history, it was
10 created in 1990. It provides owners-operators and
11 volunteers assistance for corrective actions. It is
12 generated by a 1-penny-a-gallon tank fee. As of June
13 30th, 2002, there has been \$287 million generated. As of
14 June 30th, there was 8,288 claims that have been paid by
15 SAF. And the money is used to pay 90 percent of eligible
16 costs for owners and operators and 100 percent of eligible
17 costs for volunteers.

18 The revenues anticipated for '03 are 29 million.
19 ADEQ can spend each year for their -- to oversee the
20 program for administrative costs and to administer the
21 fund, \$5.7 million a year or 21 percent of the previous
22 year's revenue on SAF. So next year -- this year
23 actually, '03, the 21 percent of what came in last year is
24 \$6.09 million. So that's our administrative cap this
25 year, 6.09 million.

1 This is a status update as of December 30, 2002.
2 There were 992 SAF claims waiting to be processed. And as
3 you know, in early November we implemented the SAF backlog
4 reduction plan. They received -- the SAF section received
5 84 applications in November and December, and they
6 processed 227. So that's just a really good trend and
7 it's continued on through January also.

8 A little history. In 2002, fiscal year, the
9 agency received 906 applications and 671 were paid or
10 reviewed which shows you that we were -- in 2002, the
11 backlog increased about 235. To date, 2003, from
12 January -- from July to January, we received 467
13 applications and we processed 543. So now we are
14 processing more than we're receiving. And that's going
15 to -- in August, September, and October, we didn't have
16 the plan implemented. So we are going to be increasing
17 quite a bit more what we review than what we receive. It
18 is about two to one right now.

19 MS. FOSTER: Mr. Chairman, isn't this an
20 indication that says that the applications are growing
21 smaller in dollar figures since you are being able to pay
22 more applications in '03 as compared to '02?

23 MR. MCNEELY: I'm not so sure about that
24 word "paid." I'm not sure if the word "paid" is reviewed
25 or paid.

1 MS. FOSTER: All right.

2 MS. NAVARRETE: Determinations have been
3 issued.

4 MR. McNEELY: "Paid" is probably not
5 accurate. I'm sorry I have that up there. I just didn't
6 notice it.

7 I think the applications will increase, too,
8 because November, December we had very few applications.
9 I think the applications are going to be more -- come in
10 at probably a quicker rate throughout the rest of the
11 year.

12 Challenges for the Department. As you all know,
13 getting the claims out the door and consistency, RBCA
14 implementation on the technical side. We've got the new
15 rules. We have got the guidance. Really, it's how we're
16 going to review risk assessments and getting the technical
17 expertise out there to actually do risk assessments I
18 think we need some work on. The high rate of
19 administrative appeals, which I can't debate what "high"
20 is, but I think the perception is that we have a high rate
21 of administrative appeals.

22 That's my -- Successes. We have 70 percent of
23 our open -- historically 70 percent of our LUST sites have
24 been closed. The national average is 50. We have about
25 24- -- or 2,400 currently open LUST numbers. I think

1 there was, like, 7,000 for the whole history of the
2 program.

3 And one thing I would like to mention, too, is
4 since I was -- in '98 when I started with this program,
5 we've closed more than a third of the sites now. Our
6 program is actually a third -- we have a third of the
7 sites closed from when I started. So that's making a lot
8 of progress. A lot of times you don't see the progress.
9 We are pumping out determinations quite a bit every year.

10 We are meeting our 21 percent administrative
11 cap. We've reorganized the SAF review process, and we are
12 improving consistency and efficiency. And we got our RBCA
13 rules out, closure requests, and 21 percent cap.

14 This is my favorite thing. I think this is the
15 most telling about the success of the program or the
16 status of the program. This number, the blue, is what you
17 saw on a bar graph before. It is releases -- open
18 releases every year or new releases. So in '02 we had 101
19 releases. The red is how many LUST numbers we closed. So
20 if you start back in here, let's say, '98, 541 opened, we
21 closed 910. 478 opened, we closed, like, 908. If you go
22 down, the trend is still good. It is 101 opened last
23 year, and we closed 233. So we doubled what we closed as
24 to what we opened. That makes sense though.

25 Early on in the history of the program these

1 things were getting started. We weren't closing many
2 sites because a lot of these were new. Then the upgrades
3 came up, and we got a lot of releases. But we did -- in
4 '97, we made the cross where this program really should be
5 a mature program by now. It has been around since '88.
6 We closed a good chunk of the sites out there, and we
7 continue to close more than we open every year. So as the
8 years go by, the program -- we should have less and less
9 open sites in the program.

10 CHAIRMAN O'HARA: Phil, if you were to
11 overlay that graph with the graph of the administrative
12 costs for the program, it would probably be rising because
13 your cap rises, and you said you are going to meet your
14 cap. At some point given the success of the program, do
15 you think -- is there a plan in place that the
16 administrative cost for administering this also will
17 decrease?

18 MR. McNEELY: I think in the '97 time frame
19 we had about a 38 percent administrative cap. And then
20 when I was on the Commission, we worked really hard.
21 That's when the statute came in at 21 percent, and we were
22 still at a 29 percent rate. Patricia, she replaced
23 Peterson with -- or Navigant at the time with internal.
24 And we dropped, if you really did it -- it was near 40
25 percent, and now it is down to 21 percent. So we

1 really -- it's gone down a lot. But the thing is there's
2 still a lot of sites that need to be closed. I think
3 eventually once you really catch up and get all these
4 sites closed, it should start decreasing. Once the claims
5 got through, or once the backlog of claims in the next few
6 years, you would think that if the trend continues, it
7 should.

8 CHAIRMAN O'HARA: Thank you.

9 MR. GILL: Phil, you keep saying "sites
10 closed." Is this sites or LUST numbers?

11 MR. McNEELY: These are LUST numbers.

12 MR. GILL: We know there can be numerous
13 LUST numbers on a site.

14 MR. McNEELY: I think we average -- we have
15 2300 -- 2400 LUST numbers, and we have 1400 sites. It is
16 like 1.8 LUST numbers per facility.

17 MR. TSIOLIS: Phil, are there any numbers on
18 how many of those LUST closures since the RBCA rules were
19 enacted or adopted were RBCA closures? And of those, how
20 many were groundwater RBCA closures?

21 MR. McNEELY: Zero groundwater, and I think
22 the soil is very minimal. I bet you, it is under 100.

23 MR. TSIOLIS: Thanks.

24 MR. McNEELY: We are still working on the
25 process of DEURs and engineering controls.

1 MR. TSIOLIS: For groundwater as well?

2 MR. McNEELY: It applies for both. We are
3 trying to change the process. It is in statute. We are
4 trying to get a bill through the legislature right now.

5 MR. McNEELY: Any other questions?

6 CHAIRMAN O'HARA: Any questions? Great.

7 Thank you very much, Phil. Appreciate it.

8 I'm going to move Item Number 6 ahead of Item
9 Number 5. Just really quickly, do you think it is a good
10 time for a break or will it be a very short presentation?

11 Without objection, we'll take a break. Keep it
12 to ten minutes. Thank you.

13 (Whereupon, a recess was taken from
14 10:11 o'clock a.m. to 10:28 o'clock
15 a.m.)

16 CHAIRMAN O'HARA: Everyone please take a
17 seat. We are going to call the hearing to order. Thank
18 you. We're going to moving Item Number 6, which is an
19 update of the groundwater study, ahead in the agenda above
20 5.

21 And I'll turn this over to Myron Smith.

22 MR. SMITH: Thank you, Michael. I would
23 like to introduce Dr. Paul Johnson of ASU who is
24 conducting the study on behalf of the Policy Commission.
25 And I'll turn it over to Dr. Johnson.

1 DR. JOHNSON: All right. Thank you, Myron.
2 Okay. That's about as focused as it gets. Hopefully you
3 can see this.

4 I'm going to give you a brief update. For some
5 of you, this may be your first and only update on the
6 groundwater study because we are just about done with it.
7 If you don't know the history of it, this is a study that
8 came out of this group. And we have talked with somebody
9 before the break. I think it took more time to develop
10 the RFP for the study than it actually took to do the
11 study.

12 But the study started a couple years ago. And
13 before I forget, I usually say this at the end but I'll
14 forget. I need to acknowledge a whole bunch of people:
15 All the folks at ASU who worked with me on the study, my
16 students who put in a lot of time. We had a lot of very
17 good support from ADEQ and Ian in particular and the
18 purchasing folks there. They housed my students for a
19 year and gave them full access to files and have been very
20 helpful with everything that we've done.

21 We've had a lot of assistance from consulting
22 firms in the area who have collected split samples for us
23 during their sampling events that we've used for analyses.
24 We've had especially a lot of help from Conoco Phillips
25 and Myron who provided us access to his sites when we went

1 out to do site sampling and additional characterization
2 work.

3 And you'll hear me refer to an expert panel who
4 also participated in the project. We had an expert
5 external peer review panel that consisted of Dr. Dave
6 Huntley who is the professor of the geology department at
7 San Diego State, and Dr. Bill Rigsby who is the professor
8 at the University of Houston, and Dr. Herman Bower who is
9 an adjunct at ASU but an expert on hydrology in Arizona.

10 So with that, just a little bit of background,
11 the original vision for the study was that however it was
12 done, it should provide some information needed to answer
13 a couple basic questions. And essentially, what we were
14 looking for is for a given spill setting that might be
15 characterized by the geology, the depth to groundwater,
16 the gradient to site, the release size, all those type of
17 things, what type of groundwater impacts would we expect
18 to see at those kinds of sites.

19 The reason for getting that kind of information
20 was presumably to help people make informed decisions
21 about sites. For example, we've heard Phil say they
22 prioritize their sites from sort of a risk perspective.
23 So this helps give some additional information to help
24 them do that type of thing. And the other thing is what
25 has been our experience so far with respect to clean-up

1 strategies at UST sites in Arizona and how does that
2 relate to the release setting and things like that.

3 The approach for the study was to develop
4 answers to those questions from -- by compiling and
5 analyzing data from LUST files, and so we did that. The
6 second thing was look at fundamental theoretical
7 considerations, perform supplemental data collection
8 analysis, and to look at other studies that were performed
9 to see what's been learned from them.

10 In terms of progress on these things, I should
11 mention the study was originally intended to be a one-year
12 study. It's turned out to be a two-year study. I'll
13 explain why as we go along here. Basically, the
14 compilation of empirical analysis of existing data took
15 about a full year. I had two students who lived with
16 Ian's bunch down at ADEQ and just spent the whole time
17 reviewing files. I think I'm going to have to pay bills
18 for psychiatrists or something like that now. They
19 actually reviewed over 400 files, collected data from the
20 built-in access database, and that database was the basis
21 for our empirical analysis of groundwater impacts of LUST
22 sites.

23 We also did the fundamental theoretical
24 considerations. That part of it was a spacial analysis of
25 proximity of UST sites to water production wells as well

1 as sort of capturing our own analyses on what kind of
2 impacts USTs might cause to water production wells.

3 The supplemental data collection phase, a lot of
4 that was dictated by data gaps that were identified in the
5 file review phase. I'll talk about specifically what was
6 done in that. That was probably the major cause for the
7 delay in the project. We had a five-month period there
8 where we were trying to contract that phase. That's
9 not -- that's not the purchasing people's fault. We were
10 trying to do that in the same time frame that ADEQ was
11 trying to move. And so that added a little bit of
12 difficulty in it.

13 But the supplemental data collection work was
14 performed from basically October through the very end of
15 December last year. And then the final report, sometime
16 in the middle of the night tonight it will probably be
17 done; and we anticipate delivering it on Friday.

18 In terms of the supplemental activities, the
19 things that included -- one of the things that popped out
20 of the study was questions about the direction of
21 groundwater flow determinations at sites; and in
22 particular we are looking at errors associated with the
23 measurements that feed into that, so errors associated
24 with water level elevation determination including survey
25 errors as well as monitoring errors. Another data gap was

1 the lack of aquifer characterization data. The Arizona
2 program doesn't require people to do aquifer
3 characterization tests, so we made a lot of decisions
4 based on qualitative descriptions of geology. And so we
5 went out and performed aquifer characterization tests at
6 some sites.

7 We also collected groundwater samples at sites
8 to look for things that aren't required to be looked for
9 but that might be issues in the future. So, for example,
10 oxygenates in fuels, alcohols in fuels, as well as other
11 constituents of gasoline that people are becoming more
12 interested in these days, like the latest one now is the
13 drinking water standard for ethylbenzene may be lowered.
14 Trimethylbenzenes are on people's hit list at the moment.
15 So all those things we looked at in our analyses of
16 groundwater samples.

17 We also went out to six sites and did what we
18 call sort of snapshots of dissolved plumes. The idea was
19 to be able to present examples of sites in different
20 hydrogeologic settings and what the impacts to groundwater
21 look like at those particular sites.

22 I should also mention while the project has
23 taken about two years exactly to date, the scope of this
24 study compared to other ones you might be familiar with,
25 like the California and Texas studies, those were both at

1 least four-year studies with smaller scopes of work than
2 what we are doing now. So while the two years is slower
3 than one year, it is still pretty fast compared to doing
4 this type of work.

5 Okay. The final report, I'm -- there's not
6 enough time here in this meeting. You don't want to hear
7 me talk about our observations. I would like to offer up,
8 if you would like, to invite me back at any time to give
9 you a presentation on the report. I'll be more than happy
10 to do that. But just to let you know what's in it, things
11 you might be interested in looking at, what's unique about
12 this report relative to the other reports is we actually
13 did a characterization of the characterization data we had
14 of LUST sites. So, for example, the California studies,
15 the Texas studies, they sort of took data, but they didn't
16 really tell you what kind of data you're dealing with.

17 And so this -- this is probably the first time
18 where we take a hard look at, okay, exactly what do
19 monitoring well networks look like at UST sites? How
20 frequently do we really sample things at UST sites? What
21 do we really measure at UST sites? So there's a lot of
22 information related to the characterization of
23 characterization data. You might be interested in looking
24 at the section related to errors in flow direction
25 determination since we've based an awful lot of our

1 decision-making and sampling on determining which way flow
2 is going.

3 The six plume snapshots that we did, what they
4 look like before using the existing data and then after we
5 went out and did our additional site assessment work. You
6 might be interested in the results of our attempt to
7 assess performance of remediation technologies at Arizona
8 LUST sites, relative locations of LUSTs and supply wells,
9 and relations that come out of the empirical assessment
10 that have, I think, some pretty significant implications
11 for implementations of a risk-based program.

12 And those are relations just between groundwater
13 concentrations and depth to groundwater, relationships
14 between groundwater concentrations and the depth to the
15 deepest detected soil impact, as well as the distance
16 between the deepest soil impact and groundwater. That's
17 part of your program as well. Soil concentrations versus
18 groundwater concentrations, because you have a little ways
19 of determining soil concentrations, you might be
20 interested in that.

21 And then just general things like if you measure
22 two feet of free product at one site and you don't see any
23 at another site, does that necessarily mean that the
24 source zone size is larger at the site than the two feet
25 of free product? So all those things that I think

1 influence our risk-based decision, depth to water,
2 perceived sizes of sources, presence of free product,
3 depth of soil impacts, all those kinds of things, we have
4 empirical relationships and lots of plots of data from the
5 empirical file review that I think you might want to
6 consider as you move forward.

7 One thing I should mention, we were expressly
8 prohibited from drawing conclusions from this study. And
9 so if you read the report and you say, Where are the
10 conclusions? It's because you told us not to draw any
11 conclusions. But certainly all of our observations are
12 there. We've tried to organize them in a way that you can
13 see how they fit together.

14 So that's all I was going to say today. If you
15 have any questions, I'll be happy to answer. As I said, I
16 will be more than happy at any time to come back and give
17 you a more detailed summary of the study and our
18 observations. And we should be delivering it on Friday.

19 MR. SMITH: Hang on a minute, George.

20 Thank you, Dr. Johnson. What I would like to
21 offer up is probably toward the end of March I would like
22 to ask Dr. Johnson along with Hal Gill and the technical
23 subcommittee to have a meeting specially devoted just to
24 the groundwater study. If it is going to be out tonight
25 at 12:01 a.m., as you say, it will give us about a month

1 to read it, to digest it, whatnot. And then I think it
2 would be great to have a technical subcommittee meeting to
3 really go through the report, understand the report,
4 rather than taking up an entire Policy Commission meeting.

5 We can take from that technical subcommittee a
6 synopsis, a reduced version, to then discuss here at the
7 Policy Commission. So I will offer that up, and Hal will
8 coordinate that with Dr. Johnson.

9 MR. TSIOLIS: I only had a very general
10 question, and I will defer that to the subcommittee
11 meeting.

12 CHAIRMAN O'HARA: Ms. Clement.

13 MS. CLEMENT: Mr. Chairman and Myron, will
14 we be getting a copy of the actual report, or will it be
15 on-line or some way we can access it?

16 DR. JOHNSON: What we are going to do is
17 we're going to deliver some hard copies down to ADEQ.
18 We're also going to make the files available
19 electronically. In fact, the most convenient approach
20 probably for most of you is going to be to get -- probably
21 to get a paper copy of the main body of the report. What
22 we are going to do is we are going to insert a CD that has
23 all the appendices as PDF files. The plan is also to
24 deliver the report as PDF files. We are going to upload
25 it on a Web page at ASU. I assume Ian may work on

1 uploading it so somehow people can get it at ADEQ. I
2 don't know.

3 MR. TSIOLIS: But it will be on the ASU
4 Web site?

5 DR. JOHNSON: Yes.

6 MR. KELLEY: Can we have that address?

7 DR. JOHNSON: I don't know what it is yet.
8 When we post it, I'll send an e-mail to Myron, and maybe
9 Myron can let the rest of you know.

10 MR. SMITH: Yes.

11 DR. JOHNSON: And to the guy over there with
12 the nice tie.

13 CHAIRMAN O'HARA: Any other comments or
14 questions for Dr. Johnson?

15 MR. GILL: Myron, I don't remember, what is
16 the Policy Commission supposed to do with the report once
17 we get it?

18 MR. SMITH: I believe we are supposed to
19 make recommendations to the legislature or to the director
20 or to both on improving the program or changing it. Ian,
21 help me out here.

22 MR. BINGHAM: Ian Bingham, for the record,
23 ADEQ. The idea is to use the report to meet the mandates
24 that are laid out for the Policy Commission in 49-1092.
25 Whatever areas that the report can help the Commission

1 address those issues was the intent. And I'll also add
2 since I'm talking, hard copies will be made available to
3 the Policy Commission members by ADEQ.

4 CHAIRMAN O'HARA: Thank you. Any other
5 questions from Commission members?

6 Thank you, Dr. Johnson.

7 Moving on to Item -- going up to Item 5, ADEQ
8 updates. Let's begin with the SAF monthly report. Turn
9 the floor over to Judy.

10 MS. NAVARRETE: Judy Navarrete, State
11 Assurance Fund. I gave you all -- or handed out to the
12 Policy Commission and also there are copies in the back of
13 the State Assurance Fund status as of January. Last month
14 we processed 130 interim determinations. And also this
15 month I attached a little synopsis of our informal and --
16 from the informal what went to formal appeal that we got
17 in as of October, November, and December, just to give you
18 a little view of how many appeals we are getting in and
19 what kind of appeals we are getting in.

20 And it is pretty self-explanatory. We are
21 getting in just about as many appeals for failure to make
22 determinations as we are for technical or cost. And
23 although I know by statute you have the perfect right to
24 file -- the regulated public has a perfect right to file
25 those appeals, it does take up our time in processing

1 applications. So we have to deal with that. And also,
2 kind of holds us up on how we prioritized our system to
3 deal with our backlog and get these applications out as
4 soon as possible because when we get an appeal, of course,
5 we have to jump right to that one and try and get it out
6 so that we don't get sanctions on it. But like I said, by
7 statute you have a perfect right to do that, so there is
8 nothing I can do about it if you file those appeals.

9 Are there any questions from the reports this
10 month?

11 CHAIRMAN O'HARA: Any questions from
12 committee members?

13 MS. NAVARRETE: As usual, all the numbers
14 are approximate except the determinations. I'm always
15 pretty sure -- I'm always sure on those. The thing is, I
16 think there's some errors in the database. I'm still
17 looking into that and trying to get those straightened
18 out. But the numbers are approximate, but you can make
19 sure that the numbers of applications that we received and
20 the number of applications that have had interim
21 determinations, those numbers are solid.

22 CHAIRMAN O'HARA: Judy, real quick, you
23 mentioned that you are getting appeals for items that have
24 missed statutory deadlines? Is that what you are saying?

25 MS. NAVARRETE: To process.

1 CHAIRMAN O'HARA: Getting a lot of appeals
2 to miss deadlines?

3 MS. NAVARRETE: Failure to issue a
4 determination because in the statute, if we fail to issue
5 a determination on reimbursement or anything within
6 statutory time frames. And you know I get in here with a
7 big backlog, so...

8 CHAIRMAN O'HARA: What do you do with those
9 appeals?

10 MS. NAVARRETE: We try to move them to the
11 front so we don't have to go to formal appeal on them and
12 then get sanctioned for consultant costs and attorney's
13 fees and everything else and end up issuing the
14 determination.

15 CHAIRMAN O'HARA: Okay.

16 MS. NAVARRETE: I think we are making a
17 good-faith effort in trying to get to these just as fast
18 as we can. We are pretty much -- we are pretty well
19 caught up on the direct-pays. The one that you see on the
20 activity sheet that was over 365 days old, we have located
21 that application. It had gone into AN and a number of
22 things and got twirled around. We finally got it. It is
23 in cost review. So let me tell you, we don't have any
24 more. And the one that's over 90 days, we are dealing
25 with that also.

1 CHAIRMAN O'HARA: Thank you. Any comments
2 from the Commission members?

3 Okay. Thank you, Judy.

4 Item B is UST corrective action workload status
5 report. Phil.

6 MR. McNEELY: I'm Phil McNeely. As I
7 mentioned last meeting, we are going to start reporting
8 corrective action workload, the amount of reports we have
9 in our files for review and how many we do review. I
10 haven't developed a format yet. We'll probably start
11 maybe next month or a month after along with Judy's report
12 just giving you just a little written what we're doing.

13 Just verbally to tell you what we have,
14 currently in our files, we have 24 sites for closure
15 requests that are unreviewed, 24. We have 23 on SCRs,
16 site characterization reports, that need to be reviewed.
17 And we have five CAPs. Also, we have five work plans that
18 are in the process. So if you add it all up, we have 57
19 reports that need to be reviewed.

20 A lot of those reports -- I have the numbers,
21 but I won't go into them -- are less than a 120-day
22 deadline and some of them are greater than a 120-day
23 deadline. The plan is we really -- Ian shifted the way
24 he's doing business. Rather than the project management
25 approach, we are doing first in-first out to get the

1 reports out the door. We should get rid of the really --
2 we should get rid of all the ones that are greater than
3 120 days soon, and then we will be meeting our 120-day
4 cycle time. I would like to just keep reporting that as
5 the months go by.

6 CHAIRMAN O'HARA: Questions or comments for
7 Phil?

8 Great. Thank you, Phil.

9 MR. McNEELY: The next item, Joe Drosendahl,
10 his kids are sick so he's not here. I think what he was
11 going to say is we'll still take comments for any UST
12 release reporting, corrective action guidance documents,
13 we'll take any comments you guys want. I guess in the
14 summertime we are supposed to go through it and update it.

15 CHAIRMAN O'HARA: Okay, thank you.

16 Item D on ADEQ updates is an update on the SAF
17 payments to insurance companies. I think Shannon was
18 going -- mentioned that at the last meeting and said she
19 was going to make a presentation. But I believe Tamara is
20 going to.

21 MS. HUDDLESTON: Yes. Just for the record,
22 this is one of those issues that is under appeal. And I'm
23 a little uncomfortable discussing it, but I will just go
24 ahead. And the statute we are dealing with is 49-1054(e).
25 And it states that, "An owner or operator shall not

1 receive payment from the Department until after the owner
2 or operator has submitted certification to the Department
3 that the owner or operator has submitted a claim against
4 any applicable insurance coverage and has certified to the
5 Department the amount of any benefits or reimbursement
6 that the owner or operator has received or will receive
7 from the insurance coverage that might apply to the cost
8 of the corrective action," which seems to apply or state
9 that you look at the insurance company first.

10 Then it goes on to say that, "The owner or
11 operator is eligible for payment from the Department to
12 the extent that the corrective action costs have not been
13 and will not be reimbursed by insurance and within the
14 coverage limits prescribed by this section. An owner or
15 operator shall report to the Department whether it has
16 insurance coverage available and shall comply with all
17 applicable financial responsibility requirements.

18 "The Department may compel the production of the
19 documents to determine the existence, amount, and type of
20 coverage available. An owner or operator shall report to
21 the Department any subsequent payment or reimbursement for
22 items made for corrective action costs. The owner or
23 operator shall remit to the Department within 30 days any
24 amounts that were previously paid to the owner or operator
25 from the Underground Storage Tank Revolving Fund,

1 Assurance Account, and that have also been recovered from
2 insurance."

3 So if you are paid from the SAF fund and then
4 you receive insurance payments, you reimburse the SAF
5 fund.

6 CHAIRMAN O'HARA: How long has that been in
7 statute; do you know?

8 MS. HUDDLESTON: I believe it was enacted in
9 '96.

10 MR. TSIOLIS: It was around in '97 for sure.

11 CHAIRMAN O'HARA: So is this a new policy,
12 an interpretation, or is it an enforcement of the statute?

13 MS. HUDDLESTON: It is an enforcement of the
14 statute as it has existed in the last six or seven years.

15 CHAIRMAN O'HARA: It just wasn't previously
16 enforced?

17 MS. HUDDLESTON: I'm really unfamiliar with
18 UST prior to October of last year.

19 MR. TSIOLIS: Mr. Chairman, I'm not sure,
20 why is this on the agenda? I am not sure exactly what the
21 issue is.

22 CHAIRMAN O'HARA: We received a call from
23 Shannon saying -- well, actually, Ron Kern, saying that
24 they had -- I thought it was defined as a policy -- or
25 interpretation of a statute. The AG said this is how they

1 should be doing something, and they hadn't been doing it.
2 It was a new policy.

3 MR. TSIOLIS: I don't understand. Has the
4 ADEQ been paying for corrective actions that are covered
5 by the insurer?

6 CHAIRMAN O'HARA: I think so.

7 MS. HUDDLESTON: There has been some
8 mispayments, yes.

9 MR. TSIOLIS: Has that been a general
10 practice of the Department?

11 MS. HUDDLESTON: I don't know if it has been
12 a general practice, but it has on occasion occurred.

13 MR. TSIOLIS: And the Department is saying
14 now that that was a mistake in those few instances?

15 CHAIRMAN O'HARA: I know you may be
16 prohibited --

17 MS. HUDDLESTON: Bob.

18 MR. ROCHA: Isn't this a little too specific
19 since we have something pending in litigation?

20 CHAIRMAN O'HARA: There is an appeal hearing
21 on it, yeah, so...

22 MR. GILL: My question is: Basically wasn't
23 a policy put in place by what DEQ was doing? And now
24 they're --

25 CHAIRMAN O'HARA: It is a legal issue.

1 MR. GILL: They are doing something
2 completely different, but we're not allowed -- Why didn't
3 we discuss this before?

4 MS. MARTINCIC: I think this is one of the
5 examples of what we just had the discussion about. It
6 seems to be a policy change to the regulated community,
7 but no one knew about it and that's why it is in
8 litigation now.

9 MS. HUDDLESTON: I don't believe it is a
10 policy change. I don't believe it ever could have been a
11 policy to violate a statute.

12 MS. MARTINCIC: New enforcement.

13 MS. HUDDLESTON: That would be a guess on my
14 part.

15 CHAIRMAN O'HARA: As a Commission, what
16 would you like to do? Do you think it is a topic that we
17 need to study, address? Or is it more along the lines of
18 Item 9A which is how do we get policies in general to us
19 prior to being implemented? I'm trying to figure out what
20 box to put this in.

21 MS. HUDDLESTON: I still go back to my
22 statement, that this isn't a policy. It's complying with
23 the statute as written.

24 MS. MARTINCIC: It is a deviation from
25 current practice though.

1 MR. GILL: My understanding is it is
2 affecting everybody. If it is affecting everybody, then
3 it was a policy that was being implemented, however
4 wrongly.

5 MS. HUDDLESTON: I don't know if it is
6 affecting everybody or not. I mean, the statute is what
7 it is.

8 MR. TSIOLIS: This sounds -- you know, this
9 type of question could turn on highly specific facts
10 unfortunately. It can. And the reason for that is it
11 depends on the number of mistakes the Department made in
12 the past that is alleging are mistakes now. If it did
13 this mistake, if it is a mistake, three or four times and
14 the rest of the time it didn't allow what has been called
15 double-dipping, then arguably it wasn't a policy.

16 On the other hand, if this mistake was
17 commonplace, the question then becomes: Do they need to
18 do a policymaking to clarify going forward how they do it?
19 And if they do do policymaking, does it apply
20 retroactively or prospectively? These are legal
21 questions. It would be great to have our legal counsel
22 with us here.

23 MS. HUDDLESTON: These are legal questions
24 that are being currently appealed in an administrative
25 appeal and can only be determined in that process.

1 MR. GILL: Why did it show up on the
2 bulletin board, if it is still in appeal?

3 MS. HUDDLESTON: It showed up on the
4 bulletin board, as I recall, because people requested to
5 know what the Department was doing about insurance
6 coverage. Judy, I mean...

7 MS. NAVARRETE: That was just for
8 information, to let you know that those were going out,
9 that those disclosure statements were going out. That was
10 a general announcement. It was just for information
11 purposes. It doesn't state anything in there other than
12 information.

13 CHAIRMAN O'HARA: Mr. Beal.

14 MR. TSIOLIS: I still don't understand
15 what's being asked of the Commission right now.

16 MS. HUDDLESTON: I don't believe anything is
17 being asked of the Commission. The Commission asked this
18 question, and the Department was responding.

19 MR. TSIOLIS: Okay, thanks. That's fair.

20 MS. MARTINCIC: Does this apply to the
21 30 day?

22 CHAIRMAN O'HARA: 30 day? Why don't we hold
23 these questions until we get to 9 because I think it is
24 part of a much broader issue on getting policy to this
25 Commission in a timely fashion so that we can make a

1 determination prior to it being implemented.

2 That was your point?

3 MS. MARTINCIC: Well, yeah. I haven't had
4 30 days --

5 CHAIRMAN O'HARA: I think it is a more
6 appropriate subject matter under that.

7 I have had a request from a Commission member to
8 receive public input.

9 MR. SMITH: Roger had a question.

10 MR. BEAL: I'm sorry. On the insurance
11 thing, I don't want to go by my memory. But I would like
12 to have a review of the relationship between the insurance
13 policies and the SAF fund. It seems, if I clear off
14 enough cobwebs, that insurance wasn't being written until
15 the SAF was in position to take some of the impact. I
16 don't know what the -- how the laws -- the chronologic
17 order that events took place.

18 But I do know that there was a relationship
19 there, and I think changing the way it has been done in
20 the past in terms of payment may affect the way business
21 is being done today. I don't know if this is not -- I
22 don't know what the appeal is.

23 So in general, I would like to know -- I don't
24 even know who to ask, but I would like to have a historic
25 development of the insurance question and application and

1 implementation so we'll have an understanding of what
2 probably was written for the intent of the statute that
3 was written at that time. Am I clear enough for you?

4 CHAIRMAN O'HARA: Yeah. I think it is
5 certainly appropriate to have someone from the Department
6 who has agreed, in their opinion, to discuss and present
7 this policy, or whatever you want to call it, the
8 interpretation. There's a lot of questions we need
9 answered as to who it applies to, when it is applicable,
10 when it was in place. Does it affect self-insureds?
11 Doesn't it? Things like that, I think there is a lot of
12 questions I would like to have answered. Obviously,
13 because of the appeal, we aren't going to get answers to.

14 MR. BEAL: Where I am coming from, I can
15 remember being required to have financial responsibility
16 and finding out that insurance wasn't being written until
17 after the SAF picked up on some of that obligation.

18 CHAIRMAN O'HARA: What about --

19 MR. BEAL: And subsequently, we had the
20 statute of the implementation of the insurance.

21 CHAIRMAN O'HARA: And some policy, I think,
22 required, it is my understanding, to go to the fund first.
23 And some of them have a high deductible. And how does it
24 all interact? I think there is a lot of questions we need
25 to study. My understanding, we're not at liberty to do

1 that today.

2 MS. HUDDLESTON: All I can say is under the
3 statute it says if the benefits -- I'm sorry, if the costs
4 are not subject to insurance, then it would be paid under
5 the SAF. I don't believe insurance is the only financial
6 mechanism the law allows. You can have others.

7 CHAIRMAN O'HARA: But this is specifically
8 saying if you have insurance --

9 MS. HUDDLESTON: You go to the insurance
10 company or the insurance policy first, if it covers the
11 release.

12 CHAIRMAN O'HARA: So my question was
13 self-insureds, you are saying -- you seem to read that to
14 say that they don't have to exhaust their own
15 self-insurance?

16 MS. HUDDLESTON: I would be guessing if I
17 guessed that, but my guess would be yes.

18 CHAIRMAN O'HARA: You would have to exhaust
19 your own self-insurance?

20 MS. HUDDLESTON: No.

21 CHAIRMAN O'HARA: Okay. I think we'll get
22 another update on that. And we'll definitely -- we need
23 to take a look at the issue.

24 MR. TSIOLIS: It is a big issue.

25 CHAIRMAN O'HARA: Absolutely. The whole

1 issue of secondary versus primary subrogation, who do you
2 go to first, that's a huge issue. You apparently have to
3 get to insurance first, and they have to have financial
4 responsibility. It seems like the fund would almost have
5 no purpose except for those costs not covered by the
6 insurance.

7 MR. TSIOLIS: And if the self-insureds are
8 satisfying the insurance obligation that's required by
9 statute, that's a big question.

10 CHAIRMAN O'HARA: It really is. We are
11 going to do --

12 MR. BEAL: Beyond that, if insurance was
13 written, maybe the fund ended it, meaning that they are
14 not going to pay it until that percentage is met as a
15 deductible. Then nobody ever gets paid.

16 CHAIRMAN O'HARA: Right. I hear you. We'll
17 continue to look at it.

18 Any idea on the timing of that? Tamara, any
19 idea on the timing of that appeal decision?

20 MS. PASHKOWSKI: The briefs are filed is my
21 understanding. I'm sorry. Barbara Pashkowski. The
22 briefs are filed. And I believe there is going to be oral
23 argument set up, but last I heard that date has not been
24 set.

25 CHAIRMAN O'HARA: Okay. Would this

1 Commission -- or would you feel the AG's Office and the
2 DEQ would be free to speak on it after an OAH decision?
3 Or would you have to wait until --

4 MS. PASHKOWSKI: Final administrative
5 decision.

6 CHAIRMAN O'HARA: Until the director rules?

7 MS. PASHKOWSKI: Director.

8 CHAIRMAN O'HARA: So it may be several
9 months?

10 MS. PASHKOWSKI: He has -- well...

11 MS. HUDDLESTON: I think he has 60 days.

12 MS. PASHKOWSKI: No, it is less than that.
13 The administrative law judge has 20 or 30 days to issue a
14 determination -- or a recommended decision. And then the
15 director has, I believe it is, 30 days to issue the final
16 administrative or agency decision.

17 MS. HUDDLESTON: That's after oral argument.

18 MR. TSIOLIS: Which has not been set yet.

19 This issue is so much bigger probably than the
20 individual issues before the OAH ALJ. I would recommend
21 we do wait until after final administrative decision to
22 discuss the matter more broadly, have a presentation, and
23 take into account what the final decision was in that
24 particular case in our discussion.

25 CHAIRMAN O'HARA: Okay. Any other comments

1 from the Commission members?

2 I had a request by a Commission member to take
3 public comment on the ADEQ updates. And I know we
4 discussed this. I feel that we probably ought to be more
5 flexible in this meeting given the fact that we changed
6 policy at the beginning of the meeting. I will ask for --
7 I'll allow public comment. I would like to keep it to
8 three minutes. And also please, if you weren't here,
9 remember to direct your comments to us and not to any
10 other members of the public.

11 So any public comment? Anyone in the public
12 like to make a comment on this? Please state your name
13 for the record.

14 MR. KELLEY: Dan Kelley is my name.
15 Mr. Chairman, Mr. Tsiolis, for your information, my
16 company has processed more than 30 claims with the -- SAF
17 claims with the payee to be an insurance company in the
18 preceding eight years. Every one of those claims was
19 paid. None of those claims was ever denied for this
20 1054(e) issue. I believe if you poll the other people in
21 this room who are submitting similar claims, you'd find
22 the Department paid every one of those claims until this
23 recent policy decision by the Department. This is a
24 policy decision. This is a reinterpretation of statute.
25 The Department can shade it any way they want, but this is

1 a policy decision. And this is what we need you to weigh
2 in on.

3 CHAIRMAN O'HARA: Thank you, Mr. Kelley.

4 Anyone else, public comment? State your name
5 for the record.

6 MR. MERRILL: Fred Merrill. I'm wondering
7 whether or not in regard to Section E, it talks about a
8 certification by the owner-operator. And then in the
9 lower part of that, there is a sentence that reads, "The
10 owner-operator shall report to the Department." What is
11 the owner-operator to do? Provide a certification or
12 report? What is the certification supposed to read? What
13 is the report supposed to contain? If now the
14 owner-operator is being required to do this, I would
15 assume that there would have to be some kind of a rule to
16 implement the statute as to tell the owner-operator what
17 he or she is supposed to do.

18 CHAIRMAN O'HARA: Okay. I want to remind
19 the public and members, we are going to continue to look
20 at this issue, so we'll have an opportunity to answer
21 those questions.

22 Mr. Pearce.

23 MR. PEARCE: John Pearce. I don't want to
24 get into debating the merits or the meaning of the statute
25 that Tamara went over, 1054(e). That's been debated in

1 the hearing forum.

2 But I'm concerned about, as Ms. Martincic
3 indicated, the whole issue about why this is coming up
4 before this Policy Commission now. I don't think there is
5 any question that this is a substantive policy statement.
6 If you read the definition of the substantive policy
7 statement under 41-1001, this is exactly what it is. Let
8 me just read it. "Substantive policy statement means the
9 written expression which informs the general public of an
10 agency's current approach to or opinion of requirements of
11 federal or state constitution, federal or state statute,"
12 I can go on from there, "including the agency's current
13 practice, procedure, or method of action based upon that
14 approach or opinion."

15 That's what this is. This is the agency's
16 current practice and approach to this particular statute.
17 It is different from the agency's past practice and
18 approach to this statute. There is no disputing any of
19 that.

20 Therefore, it is a substantive policy statement.
21 And under your charter, under 49-1092(d)(3), this
22 Commission is supposed to have the opportunity of at least
23 30 days to review and make recommendations to the director
24 before the Department adopts a substantive policy. So why
25 didn't that happen?

1 Instead, what we have on the Internet right now
2 is a form that folks are supposed to fill out and submit
3 to DEQ within 15 days of receipt of that form under
4 penalty of having their claim frozen by the Department.
5 This form, this practice, this procedure that the agency
6 has adopted has never been discussed in this forum before
7 today. This is why this Commission needs to make sure it
8 gets this information timely so that the public knows
9 about it before the Department starts requiring these new
10 actions.

11 CHAIRMAN O'HARA: Thank you, Mr. Pearce.

12 Ms. Navarrete.

13 MS. NAVARRETE: Judy Navarrete. I had the
14 programmer go in. And when the green card is received
15 from those disclosures, when it comes back in, I had him
16 add 30 days to extend that qualification for everybody to
17 get their insurance disclosures in.

18 CHAIRMAN O'HARA: Thank you. Any other
19 comments? If they are cumulative, please hold them.

20 MS. NOWACK: Thank you, Mr. Chairman,
21 members of the Commission. For the record, my name is
22 Patricia Nowack. And I feel it's my duty to get up and
23 talk about this since I was the State Assurance Fund
24 administrator from 1996 until 2002 when this change in
25 policy was made by the Department. The fact is the State

1 Assurance Fund is a partial mechanism to cover releases,
2 and the only requirements of owner-operators is to carry
3 that financial responsibility that is not covered by the
4 State Assurance Fund; therefore, third-party liability.

5 The fact is the Department never looked to see
6 whether or not somebody had insurance to cover the release
7 per se because they weren't required to cover the release.
8 They are only required to cover third-party liability. It
9 is evident through the actuarial study that was done by
10 the Department, the legislation that has been done by the
11 Department and stakeholders over the last several years by
12 subcommittee meetings including the financial subcommittee
13 meeting which you are a part of.

14 There are three places on the Web site -- on the
15 ADEQ Web site today still that says the State Assurance
16 Fund is a partial mechanism and that all owner-operators
17 need to do is carry third-party liability. And so -- and
18 seminars -- several seminars that were presented by the
19 Department over the last six years have stated that same
20 fact. So the change is definitely a change in policy.

21 Quite frankly, I'm offended by the accusation --
22 And management throughout this whole time knew exactly
23 what was implemented and how it was implemented. I'm
24 offended that it's made to look like the Department was
25 making a mistake because the Department and Patricia

1 Nowack knew exactly what we were doing and how we were
2 doing it. And everything that I did, I did at the
3 direction of the management of this agency.

4 CHAIRMAN O'HARA: Thank you. Any other
5 comments? Thank you. We'll be studying this issue
6 further.

7 Moving on to Item Number 7, identify and discuss
8 proposed UST legislation. I'm aware that there was a bill
9 that was heard this week in the house. Does anyone on the
10 Commission feel knowledgeable enough to give us a brief
11 summary to keep us up to date on this legislation, please?

12 I did ask Mr. Pearce, who I believe is drafting
13 that, is here to inform the Commission. Would the
14 Commission like to hear a summary of the bill that's been
15 introduced? Okay. Mr. Pearce. Are you prepared to --

16 MR. PEARCE: I would be happy to discuss
17 this bill. I don't know how much you want to hear. I'll
18 try to keep it very short. Let me put it that way.

19 CHAIRMAN O'HARA: Just give us -- please
20 keep it brief.

21 MR. PEARCE: There is a bill, 2423 -- House
22 Bill 2423, that was passed out of the House Environment on
23 Monday. Its next stop would be in Appropriations next
24 week. It has a number of provisions regarding a variety
25 of issues. Some of the issues that are currently in the

1 bill as amended that might be of particular interest to
2 the Commission would be measures to define the
3 consequences of the Department's failure to take action
4 and response to submittals within a certain time frame.
5 That was mentioned today.

6 It would make some clarifications as to what
7 this Commission's powers were in connection with being
8 affirmative rather than just reactionary in the sense of
9 policies. It would streamline the technical appeals
10 process that was also mentioned today so as to provide for
11 a process where the technical information is packaged with
12 anticipation of both parties and the ALJ and then
13 submitted in a stipulated format to -- or a format ruled
14 upon by the ALJ, if stipulations aren't possible, to the
15 Technical Appeals Panel, which then reviews it and then
16 comes back and conducts more of a streamlined hearing
17 where they ask their technical questions and get their
18 technical responses based on information submitted to
19 them, which includes affidavits in lieu of live testimony.

20 The idea being to save a lot of time in the
21 hearings that -- and save a lot of frustration with those
22 on the TAP because of the commencement of time they're
23 called upon to sit in these hearings to listen to the
24 lawyers argue. It adds new places for new TAP members to
25 be -- to supplement the numbers that are deficient right

1 now for TAP panels. There is only five TAP members, and
2 that's just not enough.

3 And it purports to increase their rate of pay
4 right now. Right now they are only paid \$30 per day they
5 sit in TAP. That's a hardship. In fact, they haven't
6 been paid at all, and I was wondering today if we can get
7 some idea of where that process is at. It is just
8 ridiculous. They submitted their information, the number
9 of days they have been in hearing. I don't know who is in
10 charge of getting them paid. I am diverging.

11 Anyway, the bill does some other things. It
12 would provide for some self-certification by consultants
13 as to the merits, technical feasibility, technical
14 reasonableness of reports. It would do a relatively -- it
15 would do some other relatively minor things in connection
16 with claims submittals of a like nature.

17 The bill is extremely controversial. The
18 Governor's Office is not in favor of the bill by any
19 means. ADEQ can't stand the bill. It is a
20 work-in-progress, and you are going to see an amendment to
21 the bill before it hits Appropriations that trims it down
22 to primarily the public -- the Policy Commission issue,
23 the Technical Appeals Panel issue, and a few other issues
24 that are just in imminent need that we hope that the
25 Department can get behind.

1 CHAIRMAN O'HARA: Thank you. Can we get you
2 to come back when that bill -- next month and give us an
3 update on the status?

4 MR. PEARCE: Sure.

5 CHAIRMAN O'HARA: Great, thank you.

6 Any questions for Mr. Pearce?

7 MS. CLEMENT: Question for the chair. Are
8 there any other bills out anywhere that are anticipated
9 for the UST program, or is this the only one?

10 MR. PEARCE: There is another bill that's
11 important, I think, for this program. It's --
12 Mr. Chairman, Ms. Clement, it's a bill involving DEURs,
13 which is a consensus bill from all appearances anyway,
14 although I'm not sure everyone has had a chance to look at
15 it very carefully. Probably should have been discussed
16 before this forum before now.

17 I'll give an overview. There is a DEUR process
18 that many of you are familiar with that includes reporting
19 restrictions on property when they are going to be closed
20 for the purposes environmental remediation above the
21 applicable off-the-shelf numbers. DEUR applies to soil
22 and groundwater sites unlike RBCA, and a DEUR essentially
23 replaces it.

24 The problem with the DEUR, it costs the
25 Department money to process; and there needs to be a fee

1 process put in place for the DEUR. And the Department had
2 some stakeholder meetings where they proposed how to
3 coordinate the DEUR process, vis-a-vis the fee. And Phil
4 McNeely can probably speak to this better than I can
5 because he has been a big part of this process. A lot of
6 it focuses not so much on the institutional DEURs, which
7 are just basic restrictions on using property for
8 residential purposes that applies to very many of the UST
9 sites, the bill focuses more so on engineering controls
10 and that form of a DEUR and how are people going to fund
11 engineering controls, what are the options for financial
12 responsibility aside from just depositing money into a
13 DEUR account. It will be an issue that obviously affects
14 the UST sites as well as other kinds of sites.

15 CHAIRMAN O'HARA: Thank you.

16 MS. CLEMENT: Thank you.

17 CHAIRMAN O'HARA: Any other questions or
18 comments on proposed legislation?

19 Thank you, John.

20 Let's move on to Item 8, technical subcommittee
21 updates. We are running a little short of time so if we
22 could -- I'm sorry.

23 MR. JONES: Do you mind me speaking if you
24 allowed Mr. Pearce?

25 CHAIRMAN O'HARA: Very quickly.

1 MR. JONES: My name is Gregg Jones, for the
2 record. Mr. Chairman and committee members, I have been
3 down at the legislature and kind of hearing what's been
4 going on with the HB 2423. And it's really a slap in the
5 face to taxpayers and anybody in the community that knows
6 the program because it's really -- what it is is an
7 attempt to take over the SAF administration by
8 stakeholders so they call the shots.

9 Now, Mr. Pearce kind of downplayed the real meat
10 of this. It is, like, okay, the Policy Commission now has
11 the power to deny -- it's in 1092(c)(3). And when the
12 committee here has at least 30 days to review, make
13 recommendations, it is changed now to review, approve,
14 deny, et cetera, anything concerning the program including
15 the Department's interpretations or reinterpretations of
16 statute.

17 I mean, it is a play on everybody here. I mean,
18 it's ridiculous to see that kind of legislation in here
19 and to further tweak a program that's already been
20 corrupted by this tweaking. I mean, really, how much more
21 can we tweak until this program absolutely has to be
22 reformed completely? And people may be SOL when it comes
23 to payment in that regard because the fund may go bankrupt
24 like other states, Michigan and Florida.

25 So I just keep -- the last year that I have seen

1 what's happened here, it's just got unbelievable,
2 absolutely unbelievable. And I guarantee you that the
3 legislature is eventually going to hear about it whether
4 it is through the media or whatever it takes. But it is
5 that important that you guys don't take this job lightly
6 and just, you know, special interests only. I mean, look
7 at the mandates of this committee. It is all about money,
8 saving the state money. Those are thrown out the door.
9 Thank you.

10 CHAIRMAN O'HARA: Thank you for your
11 comments.

12 Moving on to Item 7 -- excuse me, 8, technical
13 subcommittee. Like I said, Hal, we are a little short of
14 time. I sure would like to get to Item Number 9 before we
15 leave. If you could expedite that, I would appreciate it.
16 Thank you.

17 MR. GILL: I'm going to do B through E real
18 rapidly and return to A. 8B, the UST corrective action
19 rule guidance document and parking lot issues, basically I
20 would reiterate what I said, actually, at the last meeting
21 at the Policy Commission and the last technical
22 subcommittee two weeks ago, is that basically it is up to
23 the regulated public to get in their comments on the
24 guidance documents primarily for the small issues. You
25 can turn in anything, small, large issues, but primarily

1 the small issues on how -- the problems that they are
2 finding with the guidance document, how they are
3 implemented. Get those in to Joe Drosendahl. And as I
4 said, also -- and I would send in the larger issues as
5 well. But the larger issues need to be brought forward to
6 the technical subcommittee also so we can discuss them.

7 The last technical subcommittee meeting, the
8 groundwater sampling and water level measurement decision
9 matrix was handed out and discussed at length. And where
10 we left it on the table was we were waiting for DEQ's
11 review of that matrix to get back so we can have further
12 discussion on it.

13 Same thing with the draft UST release
14 confirmation policy. There were some public comments
15 submitted to DEQ from the regulated public. And we're
16 waiting for DEQ to respond to those comments and to bring,
17 I guess, the next draft of the release confirmation policy
18 to the technical subcommittee so we can refine the
19 discussion and bring that to the Policy Commission.

20 The cost ceiling tasks for site characterization
21 report, corrective action plan, basically what that deals
22 with is that there's a lot of -- And this is one of the
23 smaller -- or larger issues. There is a lot of
24 misunderstanding on how and when to implement the new
25 corrective action rule. And basically the regulated

1 public is asking for the DEQ to submit a document on how
2 to implement the rule other than the guidance document,
3 which tells you how to do certain activities.

4 But where we're having problems is -- remember,
5 where we always have problems with new rule, new guidance
6 or anything, it is never a problem with sites that are --
7 and activities that are beginning today and going forward.
8 That's clear because you have got guidance and rule for
9 you to follow. But where we always run into a problem is
10 where we've got projects and programs that are overlapping
11 the two different rules.

12 And here we have -- the reason I put these two
13 specific examples, the SCR, site characterization report,
14 and the CAP, the corrective action plan, is I had brought
15 this up once before, that if -- And I think the issue the
16 way I addressed it at that time if you were 90 percent
17 done with an SCR or a CAP and given that the new rule in
18 guidance has additional information that's required in
19 there, do you want the owner-operator to go and their
20 consultant to go back and give more information and new
21 information and add to that or submit it as it is?

22 And if I remember correctly -- And DEQ, please
23 let me know if I'm wrong. Joe said at that point, and,
24 again, looking at an example that's 90 percent done, he
25 recommended just complete it as is and turn it in. But

1 what we neglected to think about was we had projects that
2 were halfway done where you've got site characterization
3 that takes a year. All of your information has been
4 collected during that year prior to the rule going into
5 effect. Now I'm ready to write the report, but there is
6 new requirements in the rule and guidance that asks for
7 testing that was not done during that site
8 characterization or information.

9 For instance, the easy one is the groundwater
10 study. There is a lot more information required for the
11 groundwater study, not meaning sampling but going out and
12 getting information on wells in the area and
13 owner-operators that are under the plume and -- or above
14 the plume, that kind of thing. This is all new data and
15 would require another site visit and that kind of thing to
16 get this information.

17 The owner-operators and consultants do not know
18 how to handle these issues with projects where now we're
19 doing a report under the rule for an investigation that
20 was done prior to it. So we need something from the
21 Department on how to implement these particular issues.
22 It may come out of -- I'm sure a number of the questions
23 that come in from the regulated public will have to do
24 with that. But that's what 8E has to do with.

25 8A, first off, in the technical subcommittee

1 meeting we asked for -- Judy came up with another UST or
2 SAF bulletin topic request form for us to look at. And I
3 don't know if everyone has that or not. I mixed up my
4 stacks, so I didn't know if it was something I brought.

5 And what I asked for in the subcommittee meeting
6 was for any comments on that to be back to me by the 21st,
7 which they were. And then I worked with Judy modifying
8 the one that we had at the technical subcommittee meeting
9 to come up with this form. The only issues that I
10 received -- And, again, there's still confusion out there
11 about how this is supposed to be used. But this is the
12 form -- in the format that we finally came up with.

13 I think -- Does it have two different pages?
14 Yeah. What could be found on the bulletin -- And I
15 understand that we can't call it a "bulletin board"
16 anymore for reasons I have no idea why. So now it is just
17 a bulletin. But when you go to the bulletin on the Web
18 page, you will find this form and also the second page
19 which basically is the steps for -- the process for using
20 this form or implementing this form or getting it to me
21 and the DEQ.

22 And the only other thing, I think, that we are
23 going to have to add -- And I don't know. I need to talk
24 to Judy about where this would be. There still needs to
25 be some kind of discussion upfront as to what we are

1 really looking for. I still got lots of comments back
2 that just did not understand the form. And we knew this
3 problem -- because unless you were in a lot of these
4 meetings and heard the discussion behind what the bulletin
5 was for, there is evidently still a lot of confusion as
6 to, Well, what am I sending you and why?

7 And then along those lines -- And as briefly
8 popped up in our discussion on the insurance topic, there
9 was frustration from the regulated community and myself on
10 topics being posted on the bulletin. And what I want to
11 do is I want to read the recommendation that went -- voted
12 on by the Policy Commission that went to the director in
13 reference to this specific item.

14 "The problem: The ADEQ must notify the
15 stakeholders of new determinations/decisions" -- I'm using
16 determinations/decisions here. We ended up calling them
17 "bulletins" -- "that have been made during informal
18 appeal, internal discussions held, and/or subsequent
19 documents prepared within the ADEQ or other meetings
20 between stakeholders and the Department that will affect a
21 wide range of stakeholders and subsequently should be
22 applied consistently from that point forward.

23 "The ADEQ has not communicated to the regulated
24 public decisions or determinations that affect a wide
25 range of stakeholders. This lack of miscommunication has

1 resulted in misunderstandings of ADEQ's requirements and
2 expectations of the regulated community. These
3 misunderstandings have resulted in the filing of numerous
4 informal and formal appeals which necessitate the
5 commitment of state resources that would normally be
6 dedicated to the timely process of SAF claims."

7 That was the -- what the regulated public found
8 is the problem. And as you heard briefly in discussions
9 is that we feel that the policies need to come before the
10 Commission for discussion so we -- And the regulated
11 public was to be given actually the rest of that language
12 in statute once we've had 30 days to look at it and make
13 recommendations. Once DEQ implements it, the regulated
14 public is supposed to have 30 days to know that it's in
15 effect before they start getting flagged, if that is the
16 case.

17 So what we recommended was "That the SAF and
18 USTCAS," that's the corrective action section, "develop a
19 determination log," now bulletin, "to document decisions
20 made by the Department that affect a wide range of
21 owner-operators or applicants. The determinations are not
22 to be site-specific issues but should be broad-based
23 issues that will ultimately affect a wide range of
24 stakeholders. This log will document determinations or
25 decisions made in such meetings as," and it is the same

1 thing I said up in the problems.

2 "Recommend that the UST" -- "SAF and USTCAS
3 provide the determination log to the technical
4 subcommittee for discussion and ultimately to the UST
5 Policy Commission for review, discussion, and vote."

6 And basically the rest of the recommendation is
7 the second page of this -- on the document you were handed
8 out. And this is a resubmittal, I guess, if you want to
9 call it that, that Judy Navarrete handed out in our
10 November meeting mirroring what was in the recommendation
11 when we -- when the SAF was first trying to put forward
12 this process.

13 The problem and the concerns that we have are
14 based on this information and based on how this was -- the
15 process was set forth, we couldn't -- the regulated
16 community needs to understand how the DEQ sees this
17 recommendation because neither of the issues that ended up
18 on the bulletin were brought before the Policy Commission,
19 which has been discussed earlier in the insurance thing.

20 And that's what showed up, the insurance
21 decision and a one-page contract form. And that one we
22 could -- the SAF one-page contract form we did discuss
23 that earlier, not as this process. But basically we need
24 to make sure that the -- as I stated in the -- in reading
25 the problem and the recommendation, the whole process was

1 to get information in front of the stakeholders so we're
2 doing the right thing, we're not getting dozens and dozens
3 and dozens of appeals which is what's causing all the
4 backlog. That was the whole idea of this.

5 But if we are not on the same page as to what is
6 being submitted and how it is being submitted, then we
7 don't see how that -- we're helping the problem. The
8 insurance was a perfect example. There it is but nobody
9 heard of it and everyone is turning in applications and
10 getting them returned. So that's the issue.

11 CHAIRMAN O'HARA: Is that the same as
12 Item 9, or is that something else?

13 MR. GILL: Item 9, yeah, it all rolls into
14 Item 9B.

15 CHAIRMAN O'HARA: The issue is how do we get
16 policies in front of us pursuant to the statute so we can
17 make some type of a judgment or recommendation to the
18 director prior to implementation.

19 MR. GILL: It is real clear in the statute
20 that if it is a policy, that it has to come in front of
21 us. Where we have always had the argument is that what we
22 consider policy, the DEQ did not consider policy.

23 MS. MARTINCIC: It says "guidelines."

24 MR. GILL: And guidelines. We finally took
25 the step now we can get some agreement on here's a process

1 for getting these problems that are creating all the
2 appeals somewhere to where everyone can see it. But it
3 still appears that we are not on the same page as to what
4 can be put on -- and when and how you put things on the
5 bulletin board -- or bulletin.

6 CHAIRMAN O'HARA: Who is on the same page?

7 MR. GILL: The DEQ and the stakeholders.

8 CHAIRMAN O'HARA: Should we just jump right
9 into 9 since it is the same issue?

10 MR. GILL: That's fine.

11 CHAIRMAN O'HARA: I am going to go straight
12 to B. I think A is more applicability. We will get some
13 information on A. Let's go ahead and tackle this issue
14 since we are discussing it already.

15 I spoke to Bob Rocha, and I don't know that DEQ
16 is prepared to make a presentation on what the plan is.
17 But you do want to study that and look at ways of
18 implementing that requirement to bring policies to us. It
19 just seems -- I guess, you've discussed the problem.
20 We're not getting policies to us prior to implementation.
21 Is that the problem? It seems to be they make a
22 determination on an SAF application, it goes into informal
23 appeal, it goes to hearing, and it never comes to us, that
24 determination. Is that what you are seeing?

25 MR. ROCHA: Mr. Chair, for the record, Bob

1 Rocha, ADEQ. Again, Hal went through a lot of discussions
2 and points. And basically, the process as we see it at
3 this point -- and I'm not commenting -- We will work with
4 the Commission as to how we can refine this thing. A lot
5 of those issues that were identified in his update is
6 obviously we're using the subcommittee to communicate what
7 is going to be policy. And we did it with the cost
8 ceilings. We are doing it with other projects. We have
9 been working with the stakeholders through the
10 subcommittees to get items that will become policy.

11 We also are bound, obviously, by statute as to
12 how we operate. If we say you are supposed to get a form,
13 then you are supposed to get a form. I'm not going to get
14 into specifics. So statute, legal decisions, the actions
15 of the subcommittee and discussions of the subcommittee
16 all are the processes that we have been following to bring
17 issues to the Commission.

18 And, again, the two items that were mentioned --
19 I'm not going to get into specifics -- was an attempt,
20 again, in the spirit of this whole process to communicate,
21 is a communication of a process. And that was also
22 communicated to the Commission members prior to it getting
23 onto the bulletin board. It was given to the Commission
24 in a written format before it did get to the bulletin
25 board. So again, we will continue to work -- and that's

1 all the comments I'm going to make, continue to work with
2 you guys, continue to work with the Commission to see how
3 we can improve this process.

4 The form before you is again an attempt to get
5 the process and the buy-in from the stakeholders and the
6 Commission. This is a process that says, Well, you've got
7 issues. We don't know about them. Put them on the form,
8 inform us, cite it, tell us what it is so that we can
9 react and come back to the Commission and air those
10 issues. That is part of the process. That is part of
11 what we are following currently.

12 MS. MARTINCIC: I recognize I'm new to this
13 Commission. But looking at (d)(3), it seems pretty clear
14 that the Commission has the right to make written
15 recommendations before the Department implements policies
16 or guidelines, and I just don't see that that's happened.
17 I think some of the issues that are discussed in a
18 technical subcommittee make it to here. But as far as I
19 know, the technical subcommittee has not discussed the
20 insurance issue before now.

21 MR. TSIOLIS: That's a financial
22 subcommittee issue, isn't it?

23 CHAIRMAN O'HARA: Which one?

24 MR. TSIOLIS: The insurance.

25 MS. MARTINCIC: Yeah, it would go into that.

1 But that's a relatively new subcommittee too.

2 CHAIRMAN O'HARA: We haven't discussed that
3 particular issue.

4 MS. MARTINCIC: I just feel like the issues
5 aren't being -- I understand that DEQ is trying to
6 communicate, but I think that the issues have to be
7 brought to the Commission in time for us to make written
8 recommendations because it says that the director is
9 supposed to consider those recommendations, not that he
10 has to accept them but he should consider them. And as a
11 Commission, we aren't even given that opportunity up
12 until -- I mean, the last six months I have been coming to
13 these, I haven't seen the Commission has had that
14 opportunity.

15 CHAIRMAN O'HARA: Mr. Tsiolis.

16 MR. TSIOLIS: Maybe Mr. Rocha can answer
17 this. Is the reason we didn't see the insurance question
18 in a subcommittee forum for possible recommendation to the
19 Commission because the Department made the upfront
20 determination that it is not a policy?

21 MR. ROCHA: That's correct. That's a
22 statute we have to follow. That's a statute.

23 MR. TSIOLIS: If I could just follow up. So
24 what we are left with is the Department pretty much can
25 control the agenda in terms of what policy is reviewed by

1 deciding whether something is or isn't a policy. Now, I
2 don't know whether that's within the statute.

3 MS. MARTINCIC: Or guidelines.

4 MR. TSIOLIS: They're the same. I don't
5 know whether that's within the statute or not. It would
6 be nice to get some education about that process, about
7 what is a policy, who makes the determination, so that
8 that provision that requires the review can actually
9 happen.

10 MS. MARTINCIC: Mr. Chairman, I guess I feel
11 frustrated as a Commission member. Then it seems that the
12 statute needs to be changed, then, to make it very clear.
13 I mean, they are now calling it -- rather than a policy or
14 guideline, it sounds like they are now terming it an
15 enforcement issue. Do we need to add that to the statute
16 so that we can review and make recommendations on those
17 issues as well?

18 I would argue that they affect a substantive --
19 the substantive rights of owners and operators and
20 regulated parties just as much as policies and guidelines
21 do. I just feel it's -- there is a semantical game going
22 back and forth. And as a Commission member, why are we
23 spending three hours if we can't make any decisions or
24 recommendations on these things? That's my two cents
25 worth.

1 CHAIRMAN O'HARA: I think you made a good
2 point earlier, George, when you were separating -- or
3 making a distinction between policies and these policies
4 that are generated, what did you say, from confrontation?

5 MR. TSIOLIS: Case in controversy, through
6 formal adjudication as opposed to policy and rulemaking.

7 CHAIRMAN O'HARA: It seems to me in my
8 experience with the Commission in several years, there has
9 been very few policies that come to us before they are
10 implemented except for, say, cost ceiling documents or
11 corrective action rules. And what we spend a lot of time
12 doing is finding out about something that's been
13 implemented such as an SAF decision or a denial and it
14 comes out in a determination letter.

15 Then the party comes to us and says, Hey, they
16 are doing this now. And we end up trying to debate it
17 after it's already been done. So it seems like there is
18 two separate -- mostly it seems the decisions are made on
19 applications or reports. And if they make the decision at
20 the time of doing it, it goes into determination and then
21 we don't really hear about it until it comes out.

22 I don't know if there is a way to get in the
23 middle of that process and say, From now on, we are going
24 to stop paying for X, Y, Z. They should come to us and
25 say, Hey, guys, we think we are going to stop paying for

1 these types of things from now on. Do you guys approve or
2 disapprove? Then wait 30 days. It seems like that's when
3 we need to get involved in the process, but we're not. We
4 getting involved at the end of the day when it's already
5 been denied and appealed.

6 MR. TSIOLIS: Mr. Chairman, I want to
7 clarify what I mentioned earlier. It may very well be
8 what we consider to be a surprise, in actuality has been a
9 policy all along and it is just the opinion of certain
10 stakeholders that say it's not. Certain people go before
11 an informal appeal process might say, This was never done
12 before. The reality may be they are just not happy with
13 the policy, and it has really been in place for years and
14 it's just dawning on them. There also needs to be a way
15 of distinguishing those as well so we do really focus on
16 those new policies as opposed to those policies that have
17 been in place for a while.

18 CHAIRMAN O'HARA: Given the fact this is
19 really our mandate and has been for several years, it is
20 probably a good time to get on the same page with the
21 Department, sit down maybe in a stakeholder meeting or a
22 subcommittee meeting, and really define the process and
23 what types of things we feel we should be looking at, get
24 agreement from the Department, and then set up a process
25 going forward where we get those things on the front end

1 as the statute applies.

2 MS. MARTINCIC: Which is what I thought
3 Hal's committee did for months.

4 MR. GILL: That's exactly what it says. And
5 the process is the second page of your handout. And I
6 guess what we are saying is the DEQ did not follow that
7 process. Judy worked hard with me coming up with this
8 form and with the second page. We spent a lot of time.
9 We spent numerous meetings. Like I said, this was
10 originally submitted in the November Policy Commission
11 meeting, so it has been going on for a long time trying to
12 get this on the Web.

13 And I'm not saying the Department has not been
14 working diligently with me to try to get this done to get
15 this in place. But when things show up that we've never
16 even discussed, then that doesn't match the thing. In
17 other words, the bulletin is supposed to be used to get
18 information out that has been discussed, is understood
19 that this is the way we think it is going to be. If we
20 can't reach consensus in the technical subcommittee
21 meeting, we bring the arguments to the Policy Commission,
22 we discuss it, and vote on whether or not we believe it
23 needs to be on the bulletin. That was exactly what it
24 says in the recommendations and in the second page of your
25 handout.

1 CHAIRMAN O'HARA: Maybe it would be good to
2 get -- I thought you had agreement -- maybe get something
3 from the Department in the next meeting that really
4 clearly defines those things that are policy that this
5 applies to. Maybe it then defines those type of things
6 such as -- I guess it's a statute that's already been
7 there that's being enforced -- those types of things that
8 would fall outside of this so that we are very clear on
9 what things we are going to see and what things we are not
10 going to see.

11 MR. TSIOLIS: Mr. Chair, if I may,
12 unfortunately, the perfect example -- somebody that might
13 be the perfect example is the subject of litigation, is
14 the insurance issue. It may very well be that the
15 Department has been acting outside its authority all this
16 time. If that's the case, no matter how much we debate
17 that policy, no matter what advice comes from the
18 Department, it feels that the statute is clear on its face
19 and has an obligation to enforce it as it sees it no
20 matter what we do. So that may not be an example of -- on
21 the other hand, it may very well be a vehicle for
22 discussion what the Department feels is a policy as
23 opposed to is not a policy.

24 CHAIRMAN O'HARA: Right. I think that would
25 be a good starting point, to get some guidance from them

1 as to what applies and what doesn't, falls outside.

2 MS. CLEMENT: Mr. Chairman, it is broader
3 than policy. It also includes guidelines. If we have the
4 Department provide us information, let's make sure we are
5 as broad as our mandate is. Thank you.

6 MR. TSIOLIS: If I could make a motion. It
7 may be very helpful for the members of this Commission to
8 have the counsel for the Commission come up and explain
9 the interrelation between guidance and policies -- to me
10 they are the same, and rules -- and when legislative rule
11 or regulation versus an interpretive rule, which is a
12 policy of guideline, is necessary.

13 CHAIRMAN O'HARA: Would she be an
14 appropriate party for that?

15 MR. TSIOLIS: Somebody at the AG's Office.
16 We need some legal advice here so everybody understands
17 exactly what that mandate is.

18 CHAIRMAN O'HARA: Shall we go straight to
19 the attorney or should we have maybe a presentation on the
20 Department what they feel is their reason for denial and
21 have the attorney --

22 MR. TSIOLIS: It could be both.

23 CHAIRMAN O'HARA: Do we need to vote on
24 that?

25 MR. TSIOLIS: Something to think about.

1 CHAIRMAN O'HARA: Let's continue this
2 discussion on the next meeting. Maybe we'll have some
3 guidance.

4 MS. NAVARRETE: Mike, may I make a comment,
5 please.

6 CHAIRMAN O'HARA: Sure.

7 MS. NAVARRETE: I wanted to comment on the
8 contract form that's on the bulletin board. We did a
9 presentation a few months back on the waiver form and the
10 contract form in the Policy Commission. We did it at the
11 technical subcommittee first. It was brought to the
12 Policy Commission. They were voted on. They were
13 accepted. And I put the contract form and the waiver form
14 on the Web site as forms. And then I'm sure that I
15 informed you that I was going to put the contract form on
16 there for your view to see how the bulletin worked, and
17 that's how that got on there.

18 And then Hal's comment as to ADEQ's returning
19 applications on this insurance issue, that's not true.

20 MR. GILL: It is.

21 MS. NAVARRETE: I'm not returning any
22 applications.

23 MR. GILL: We got them.

24 CHAIRMAN O'HARA: Can you call her and
25 settle that?

1 MS. FOSTER: Excuse me, Mr. Chairman. Can
2 you provide ADEQ within, like, two working days actual
3 facts and figures? A lot of times we bring up cases that
4 have been resolved or incidents that have been resolved
5 years before and the issues keep coming back, and we waste
6 a lot of time going over them when somebody is asked for a
7 specific case or a specific interpretation and the person
8 bringing the comment up cannot provide it to ADEQ.

9 CHAIRMAN O'HARA: Okay. I'll talk to you,
10 Bob, and see if we can get some type of presentation in
11 the next meeting, more clarity as to interpretation of
12 that statute.

13 MR. ROCHA: I would suggest maybe you do it
14 concurrently with the AG's Office because it is very
15 important that we get those legal definitions upfront and,
16 again, going in those legal definitions. And the
17 responsibility of the Department and personnel, as a
18 public employee, we have the responsibility we cannot
19 add -- if we know that there's something that was done
20 incorrectly, done incorrectly with approval, knowledge of
21 previous personnel or administration, when we find that it
22 is in error, it is our responsibility to correct that
23 legal interpretation. So that's -- we cannot go against
24 the law as public employees. Or we are personally liable
25 and everyone below us is liable.

1 CHAIRMAN O'HARA: I don't want to get caught
2 in that one example.

3 MR. ROCHA: That's why my comment about the
4 legality of this issue and the one that is on the bulletin
5 board, whether it was done with approvals from everybody
6 for years or not is a different issue. Once we determine
7 that's inappropriate, we need to act.

8 CHAIRMAN O'HARA: Sure. Any other comments
9 or questions?

10 Let's briefly -- 9A, my recollection is that was
11 an item from the last meeting minutes. And it deals with
12 the applicability of the administrative appeals process
13 for those appeals related to statutory -- missed statutory
14 deadlines.

15 I think you addressed that you are getting quite
16 a few appeals. And you mentioned that you move them to
17 the front because you don't want to go to a formal. But
18 they do have administrative rights, formal rights?

19 MS. NAVARRETE: It's questionable.

20 CHAIRMAN O'HARA: Is a policy made -- has
21 the Department made a determination on that? Or are you
22 deciding?

23 MS. NAVARRETE: I am going to have the
24 attorney answer that.

25 CHAIRMAN O'HARA: Please feel free.

1 MS. PASHKOWSKI: Barbara Pashkowski. There
2 is an issue of interpretation with respect to the
3 difference between volunteer and owner-operator and
4 whether both of those parties can seek an informal appeal
5 from the Department for failure -- for the Department's
6 failure to respond within the statutory time frame.

7 There is also an issue as to whether a formal
8 appeal would be the next course of action post the
9 informal. There has been some cases that have gone up.
10 There's some pending issues or matters before the director
11 on this issue. So it's sort of --

12 CHAIRMAN O'HARA: It is under litigation.

13 MS. PASHKOWSKI: Right. It is under
14 litigation?

15 CHAIRMAN O'HARA: Great. Any comment,
16 questions from committee members? Okay.

17 Once again, briefly, since we did change
18 policies, I'll allow some brief public comments on Item 9.
19 Anybody? Try to keep it brief and not cumulative. If it
20 is the same point over and over, let's try not to hear it.

21 MR. KELLEY: Dan Kelley again. I'll just
22 limit my comment to 9A. So the Policy Commission --
23 Mr. Chairman, the Policy Commission needs to understand
24 that if -- the DEQ's now current interpretation, as
25 Barbara has just explained is, in fact, a policy decision

1 of the Department. We have filed multiple
2 failure-to-respond appeals over the past two to three
3 years, and only within the last two months has the
4 Department made this policy determination that Barbara
5 just discussed. So this is an example of another policy
6 that the Department is not bringing before this Commission
7 to get the Commission's input on, number one.

8 Number two, if the director makes a
9 determination that a formal appeal is not the final
10 vehicle for this process and/or that volunteers,
11 owner-operators don't have the right to file a formal -- a
12 failure-to-respond appeal, there will be no licensing time
13 frames on this program, zero. This agency came to the
14 stakeholders and said, Do not put licensing time frames on
15 our program in rule. We have them in statute. Today they
16 want to say, No, we don't even have licensing time frames
17 in statute. That's my comment. Thank you for the time.

18 CHAIRMAN O'HARA: Mr. Merrill.

19 MR. MERRILL: Mr. Chair, members of the
20 Commission, some months ago I sent -- not months, some
21 time ago I sent a letter to Mr. O'Hara in regard to a
22 policy that was implemented -- well, not necessarily
23 implemented by the Department. It is Policy
24 Number 0132.000 entitled Administrative Case Law Policy.

25 I'd asked the chair to go ahead and put it on

1 this agenda. In talking with Mr. O'Hara, he's indicated
2 that he thought that possibly 9A would address that. But
3 in subsequent conversations with him, he thinks it would
4 be better to go ahead and specifically put this policy on
5 the agenda for the next Policy Commission meeting.

6 Let me just summarize by telling you what the
7 policy is. It was enacted -- or the issue date of the
8 policy was February 20th, 1998. It was signed off by all
9 of the division directors and the director of the agency.
10 And basically it says, "The policy will address appealable
11 agency actions and administrative orders that are not
12 resolved within six months of the filing of the appeal.
13 Longstanding cases will be dismissed from the
14 administrative hearing docket and/or resolved by the
15 director and then removed from the administrative case
16 log. The responsible party for the implementation of this
17 is the Office of the Administrative Counsel."

18 To my knowledge -- And I have sent an e-mail to
19 Steve Burr. I have talked with him personally about it.
20 I followed up with a letter to the chair, with a letter to
21 the director asking him as to the implementation of this
22 policy because a vast majority of the appeals through this
23 agency come through the UST program. It is an interesting
24 policy that I don't know has been implemented. And I
25 think that here's a vehicle that's been in place since

1 1998, and it would greatly assist the Department in
2 identifying those appeals that have been on the docket for
3 a lengthy period of time. Thank you.

4 CHAIRMAN O'HARA: Thank you. Any objection
5 to putting that on the agenda for the next meeting to
6 discuss? It is an existing policy that may alleviate some
7 of the problems with caseloads of appeals. Any
8 objections? Okay.

9 MR. MERRILL: Mr. Chair, this is on the
10 agency's Web page, so you can access it.

11 CHAIRMAN O'HARA: Thank you.

12 Any other quick comments on DEQ policy
13 interpretations? Mr. Pearce.

14 MR. PEARCE: Just a quick question. This --
15 I have got a lot of questions about this from
16 owner-operators. This form that was shot out recently,
17 ADEQ State Assurance Fund insurance disclosure form, did
18 this get discussed in this Policy Commission and approved
19 by this Policy Commission before today? I need to make
20 sure about this. I thought that I heard this was
21 discussed before today, this form.

22 MS. NAVARRETE: What's the question?

23 MR. PEARCE: Was this form, this insurance
24 disclosure form, discussed in this Commission before
25 today? And if so --

1 CHAIRMAN O'HARA: I have not seen it, no.

2 MR. PEARCE: Okay. I have a question on the
3 appeals. I want to make sure I understand this. This is
4 an interesting chart, the 64 informal appeals. It says --
5 the chart shows a number of formal appeals filed from the
6 original 64 informal appeals filed for the month of
7 October, November, and December, this pie chart.

8 CHAIRMAN O'HARA: John, I'm sorry. You are
9 talking about 9A, the administrative appeals related to
10 statutory deadlines?

11 MR. PEARCE: Yeah, that's part it.

12 CHAIRMAN O'HARA: If you want -- if it is
13 part of that topic, you can go ahead and ask the
14 Commission a question. If you want to hold off for public
15 comment --

16 MR. PEARCE: I thought this was the pubic
17 comment.

18 CHAIRMAN O'HARA: This is just on 9A. Any
19 other quick comments on 9?

20 Let's move on to Item 10, discussion of agenda
21 items for next month's Commission meeting.

22 Gail, this was your suggestion. I know we put
23 that on for next meeting. Do you want to --

24 MS. CLEMENT: I have two questions,
25 Mr. Chairman. One is: How does an agenda item get on the

1 agenda since as a Commission member, I thought it was our
2 duty to suggest items. Who makes that final determination
3 if it is on the agenda?

4 CHAIRMAN O'HARA: I usually make that
5 decision. I prepare the agenda. My philosophy, I have
6 discussed it with other Commission members, we can put
7 anything that Commission members want to see on there, try
8 not to limit things as long as it is under our mandate.

9 MS. CLEMENT: Mr. Chairman, my concern on
10 the Technical Appeals Panel, as Mr. Pearce pointed out,
11 there is legislation. Having just served, I think, about
12 a month's worth of duty in the last three months, if you
13 take all of the time for review and writing the technical
14 findings of fact, this is a real issue that's going to
15 affect what comes in front of the Commission, how the
16 agency operates.

17 And so I'm a little dismayed that we've delayed
18 the discussion of this because with the legislation that's
19 in front of the legislature, if that doesn't pass, then
20 what relief will happen with the Technical Appeals Panel,
21 in particular the number of members? So I definitely want
22 to make sure this is included in the next meeting, but I
23 would also request that as a new member, if we think
24 something is very important, we discuss it, it does get
25 included on the agenda.

1 CHAIRMAN O'HARA: Let me address that. I
2 received a question from Shannon Davis of the Department
3 to postpone discussion on three issues, and those issues
4 you will see on -- they were originally on the draft
5 agenda. And on the final agenda, they were moved back.
6 She needed time to prepare for those. And also this
7 Commission has not been briefed, to my knowledge, at all
8 on the Technical Appeals Panel. In order to have an
9 informed discussion, I would like to circulate some
10 information beforehand. I do get those agendas out early.
11 So if you have a specific comment on the final, we can try
12 and change it.

13 MS. CLEMENT: My main concern, just to
14 reiterate, is that there is not enough members of the
15 Technical Appeals Panel. It is delaying the hearing of
16 appeals. And if we lose this legislative -- because it is
17 by statute, the number is dictated by statute. If we lose
18 this legislative period, it will just further delay
19 appeals, and the process will become more burdensome.

20 CHAIRMAN O'HARA: What's the timing right
21 now on legislation to get that -- I assume you are wanting
22 a recommendation from the Policy Commission?

23 MS. CLEMENT: Yes, I would.

24 CHAIRMAN O'HARA: It would be helpful to get
25 that?

1 What's the timing on that bill, John? If we
2 wait until next meeting to give a recommendation, will it
3 be too late to help that bill?

4 MR. PEARCE: Yes.

5 CHAIRMAN O'HARA: Do the Commission members
6 feel it's important enough to schedule a special meeting,
7 circulate some information? And maybe we can either have
8 a special meeting or a teleconference to recommend that
9 portion of the bill be recommended.

10 MR. GILL: I don't have a problem.

11 CHAIRMAN O'HARA: Would it be helpful to
12 have that bill? We can have a special meeting. Obviously
13 it's important enough. I just want to take the
14 temperature of the --

15 MR. TSIOLIS: I am hearing it would be
16 helpful.

17 CHAIRMAN O'HARA: Can we get some
18 information on it?

19 MS. CLEMENT: We have the acting chairman
20 here today. Perhaps we should ask.

21 MR. SNYDER: I could provide you with some
22 information on the Appeals Panel. Phil Snyder.

23 CHAIRMAN O'HARA: On the Technical Appeals
24 Panel, the things she mentioned, the number of people, if
25 we can get that next week and I'll circulate e-mails to

1 everyone. We'll have a conference call. I think we can
2 do a meeting by conference, vote and make a
3 recommendation.

4 MR. GILL: Maybe an issue on what the
5 problems were, how this would hopefully solve the problem
6 so we know what we are discussing.

7 MS. CLEMENT: I'll work with you,
8 Mr. Chairman. Thank you very much.

9 CHAIRMAN O'HARA: You bet.

10 Any other comments on Item A? We'll have that
11 next meeting -- we'll have a quick meeting.

12 Item B, DEQ presentation of risk-based
13 corrective action and declaration of environmental use
14 restriction, DEUR. As I mentioned, we postponed that. I
15 don't think DEQ was prepared to make a presentation. I
16 anticipate having that on the next meeting.

17 MR. BEAL: Is that also before the
18 legislature right now?

19 MS. MARTINCIC: Yes. I would like us to
20 discuss that on the special meeting, if we can as well,
21 being that it is down there.

22 CHAIRMAN O'HARA: I will try to get Shannon
23 to get some information. I will talk to her and try to
24 get something sent to us, at least their position. Be
25 prepared to discuss that at the next meeting.

1 Theresa.

2 MS. FOSTER: In regards to 10B, can ADEQ
3 also include in their presentation information relating to
4 how they can provide a list of site closures under DEURs,
5 have that available to cities because it does seem to be a
6 problem right now of not knowing that a DEUR is completed.
7 And we just need more public notification to cities who
8 have a major impact in those DEURs when it relates to
9 right-of-ways and future water production.

10 CHAIRMAN O'HARA: Anyone else prepared to
11 provide information on that to Commission members so we
12 can make an informed decision next week? Anybody else?

13 MS. NAVARRETE: Completed DEURs are on the
14 remediation Web site. Don Stolkets knows where to go to
15 get those in the remediation database.

16 MS. FOSTER: Mr. Chairman, is there a way
17 there could be, like, an electronically available list of
18 what's been closed recently, whether it is a DEUR or not,
19 rather than go into each individual case?

20 MS. NAVARRETE: I believe that list is
21 available through the remediation database. Let me check
22 that. If not, it can be done as a report.

23 CHAIRMAN O'HARA: I understand we are going
24 to get information from someone on this issue?

25 MS. MARTINCIC: It is DEQ. It is their

1 legislation.

2 CHAIRMAN O'HARA: Shannon will be the one to
3 provide that.

4 MS. MARTINCIC: You could, Phil, do that?

5 MR. McNEELY: What's the request?

6 MS. MARTINCIC: Go over the DEUR
7 legislation.

8 MR. McNEELY: You want that at the next
9 meeting?

10 MS. MARTINCIC: The special meeting.

11 MR. McNEELY: Amanda can do it.

12 CHAIRMAN O'HARA: That's the subject of two
13 different bills, I guess.

14 Any other comments on Items A and B? We will
15 look at these issues and have a vote probably next week.

16 Item C, definition of adequate documentation for
17 an SAF application. I put that on there really as an
18 example of why the current SAF rules are kind of outdated.
19 I think they were passed in September of 1992. And if
20 you'll look at those rules, they kind of define adequate
21 documentation. I am not a lawyer obviously. But from my
22 reading, it basically just says broken down invoices and
23 technical reports describing the work performed. And that
24 obviously is not what is defined as adequate documentation
25 in the current process, judging from comments that have

1 been described in some of our meetings on some of the
2 things that have been asked for.

3 So my only point was we probably need to revisit
4 the SAF rules. About a year ago, there was a process
5 established and many stakeholders meetings to get those
6 rules updated. And that was postponed until the
7 corrective action rules would be passed because there may
8 be some relationship between those two. And so we
9 probably need to revisit that and have more meetings and
10 get the SAF rules up to speed. I think that may be a good
11 step in mitigating, if not eliminating, a lot of these
12 appeals that are related to adequate documentation.

13 MR. TSIOLIS: Mr. Chairman, if I just might.
14 There may be still in the Department's records the latest
15 version of a straw man that had been published. That
16 would be possibly a good place to start. Focusing on just
17 adequate documentation, the current SAF rules in so many
18 ways don't reflect the current process.

19 CHAIRMAN O'HARA: Sure. I think we have had
20 some discussion at the last meeting about what is adequate
21 documentation. There is certainly disagreement from both
22 sides as to what the Department feels they need in order
23 to make the decision and what the regulated public feels
24 they need to submit. So if we can get those two parties
25 together and make agreement and have a list of the rules

1 of here's what you submit, it is very clear and it is good
2 guidance going forward on what should be included in the
3 application in eliminating a lot of appeals. At any rate,
4 that will be on the agenda for the next meeting.

5 Any other issues that anybody would like to see
6 on the next -- Mr. Foster.

7 MS. FOSTER: Mr. Chairman, I am real
8 concerned that we aren't working diligently on rewriting
9 the SAF rules right now. We heard that it was delayed due
10 to the corrective action rules. They have been done for a
11 while. I thought that we would progress immediately into
12 SAF rules. I am a little bit concerned right now of the
13 appropriate use of SAF funding when it comes to submittal
14 of SAF claims.

15 Normally, when an owner-operator puts in a
16 claim, he puts it in for appropriate work that was done or
17 phase of work that was done on a yearly basis. And what
18 I'm hearing is that there is some inappropriate use of
19 funds of people applying to the SAF fund on a monthly
20 basis. So every time they get an invoice, they submit it
21 rather than wait for a phase to be done or a year to go
22 by.

23 If someone is doing that, I would like to know
24 who they are and why they're doing it if they think every
25 month is an appropriate phase because instead of turning

1 in one application where the SAF prep work might be
2 \$2,000, let's say -- and I don't know what the cost
3 ceiling is -- the 12 months of application are costing the
4 fund \$24,000 just to turn in 12 applications instead of
5 one.

6 CHAIRMAN O'HARA: I think that's an
7 appropriate question. I think you also have to balance --
8 my understanding is balance the need for the fund to save
9 those monies -- can do fewer applications with a need
10 of -- particularly in the direct pay for consultants, that
11 this is their cash flow and their billing. So there has
12 to be a mechanism for them to get paid other than 90 or
13 120 days. No business can go that long without being
14 paid. So I think there is a balance there that we
15 certainly need to discuss.

16 MS. FOSTER: I think if the prep work for
17 the SAF is more than what is being collected, that needs
18 to be looked at.

19 CHAIRMAN O'HARA: Sure. There are limits on
20 that by the co-pay, which I think are 10 percent of the
21 actual corrective action costs. That's the most you can
22 have for SAF reimbursement cost. There is some limit on
23 it. Certainly I understand it creates an administrative
24 hassle in the Department too. It is certainly an issue we
25 ought to look at.

1 Any other issues that the members would like to
2 see on the agenda?

3 Move on to Item 11, general call to the public.
4 Please keep -- we are actually past time.

5 MR. GILL: I would like to make a comment.
6 If we are going to hold the public comment to the end, we
7 are either going to have to agree to wait until the public
8 talks or have them after each discussion item because this
9 Commission isn't here just to hear ourselves talk. We
10 really need to hear from people we are representing.

11 CHAIRMAN O'HARA: Absolutely, sure. I think
12 we need to probably keep our agendas to the point where we
13 can finish each item. We had several presentations today.
14 That's another reason I tried to move some items back to
15 the meeting.

16 Anybody in the public like to make a quick
17 comment? Mr. Beck.

18 MR. BECK: Brian Beck. I actually provided
19 you five written comments since I thought we were going to
20 go to that particular forum. But the biggest one is going
21 back to the insurance issue real quick on the form. My
22 question is: You are asking for this information. The
23 information is given 30 days. Claims are not going to be
24 processed because of this thing. And what is the use of
25 asking for this information right now?

1 I have a number of clients that have received
2 this particular request for information on insurance
3 information we have filed previously; and for some reason,
4 the information that was previously filed, and we have
5 documented when it was, is no longer there. And then we
6 have claims being held up asking for information again.

7 CHAIRMAN O'HARA: Mr. Beck, we are going to
8 have this issue on the next agenda so if you would bring
9 those comments at that point, it would be appropriate.

10 Mr. Pearce.

11 MR. PEARCE: Just another suggestion. You
12 are going to have a special meeting to talk about the
13 Technical Appeals process?

14 CHAIRMAN O'HARA: No. I think the issue is
15 that there is draft legislation that is supposed to
16 correct some of the inefficiencies of the Technical
17 Appeals Panel, and it is necessary for us to have a
18 recommendation.

19 MR. PEARCE: Let me suggest you add to your
20 list of things to take a look at the portion of the bill
21 that talks about the Policy Commission that you sit on,
22 and perhaps you can take a look at that as well. That
23 would seem to be maybe a good idea to have you people
24 evaluate that part of the bill since it is about you.

25 CHAIRMAN O'HARA: We'll look at the entire

1 bill.

2 MR. PEARCE: I'll just note the third piece
3 of the bill is going to survive. I do want to say this to
4 Mr. Jones. Your point is well taken about "deny." That
5 was bad crafting, and that is coming out of the bill along
6 with a bunch of other issues that are deemed to be
7 offensive. This bill is going to become a bill that's
8 much, much more moderate in scope in some of issues than
9 it looks right now. I just want you to know that. Your
10 point about "deny" was a very good one.

11 CHAIRMAN O'HARA: Direct those to us.

12 MR. PEARCE: And you are right. Anyway,
13 this bill will have about four or five issues in it. And
14 two of them we have mentioned. A third one is the topic
15 of 10C, what you submit that's adequate and resolves that
16 conflict between the rules and some interpretations that
17 are being made.

18 CHAIRMAN O'HARA: Thank you, John.

19 Any other comments from the public?

20 MR. TREMBLY: Jeff Trembly, for the record.
21 I just wanted to note something that if the Policy
22 Commission does get involved in this insurance discussion,
23 that one of the mandates as read this morning by
24 Mr. McNeely was the Commission's evaluation or
25 recommendation of dates to phase out the SAF and transfer

1 responsibility for corrective action costs to the private
2 insurance industry. That's one of the Commission's
3 mandates. If you get into the insurance discussion,
4 certainly take that into consideration.

5 CHAIRMAN O'HARA: Thank you.

6 Any other comments? State your name for the
7 record, please.

8 MR. KELLEY: Dan Kelley commenting again.
9 Unfortunately, I have a lot of comments to make and that's
10 driven by this new structure of public comment procedure.
11 I won't abuse the Commission's time today to go through
12 all of this. I will just stick with my comments on the
13 structure of the public comment procedure. When we move
14 all public comment to the very end of the agenda, as we
15 are today, that does nothing but marginalize the public
16 comment, and here's why.

17 The ADEQ has had endless opportunity to stand up
18 here and present its version of events, its side of the
19 story, its propaganda. Stakeholders who provide this
20 Commission with the other side of the picture are now
21 marginalized. And everyone in this room wants to leave
22 immediately. Nobody wants to hear me talking. Nobody
23 wants to hear these comments. The comments are completely
24 marginalized.

25 I ask this Commission to please reconsider this

1 issue on the next agenda whether we are going to
2 marginalize the public in this process or include them in
3 this process.

4 CHAIRMAN O'HARA: Dan, if you would have
5 been here, you would have understood. Let me reclarify
6 for everybody. We are going to take public comment on
7 every agenda item. That's going to be via a speaker slip.
8 We are not going to automatically add public comment to
9 every single item as it has been done in the past. It is
10 going to be a discretion basis, and it is going to be
11 based on speaker slips. You will have an opportunity to
12 speak. You just have to submit a slip prior to having
13 that meeting.

14 MR. KELLEY: Every time I raised my hand
15 today and wasn't recognized, at the next meeting I would
16 be able to speak on that issue because I would have put in
17 a speaker slip?

18 CHAIRMAN O'HARA: Absolutely.

19 MR. KELLEY: That's fine. There is no
20 speaker slips available.

21 CHAIRMAN O'HARA: I understand. That's why
22 we bent the rules today. It is a new process that was
23 voted on at the very beginning and going forward. I have
24 that process in place.

25 MR. KENNEDY: John Kennedy. Does that mean

1 now that Judy can't stand up and answer when she feels
2 like it? Bob can't interject when he wants?

3 CHAIRMAN O'HARA: Part of that --

4 MR. KENNEDY: Will it be that speaker slips
5 will be required for every member other than the
6 Commission to speak?

7 CHAIRMAN O'HARA: Part of that, for both
8 your benefits, I don't think either one of you were here,
9 however, you do not direct comments to any other members.
10 You direct comments to the Commission members. And then
11 if it is appropriate, we can ask Judy to answer the
12 question, if she feels. For you to examine her or ask
13 questions, she may not be prepared for.

14 MR. KENNEDY: I'm just saying there was
15 interaction.

16 CHAIRMAN O'HARA: The chair recognizes
17 speakers. If you are recognized, you are able to speak.

18 MR. KENNEDY: Okay.

19 CHAIRMAN O'HARA: Any other comments?
20 Great. Moving on to -- Let's go back to that
21 vice chairmanship.

22 Announcement, next meeting is March 26th, in
23 this room at 9:00 o'clock. Actually, we are going to have
24 a meeting next week. I will circulate e-mails to you guys
25 and find out what's best for your schedules. We can

1 either meet in person or meet via teleconference. I would
2 like to get your input on that.

3 Without objection, meeting adjourned. Meeting
4 adjourned. Thank you.

5 (Whereupon, the proceedings adjourned at
6 12:11 o'clock p.m.)

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